①

Supreme Court, U.S.
FILED

No. 06-385 SEP 14 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MALACHY MCALLISTER,
NICOLA MCALLISTER and SEAN R. MCALLISTER,
Petitioners,

—v.—

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EAMONN S. DORNAN
Counsel of Record
SMITH DORNAN & DEHN P.C.
110 East 42nd Street, Suite 1303
New York, New York 10017
(212) 370-5316

Attorneys for Petitioners

QUESTIONS PRESENTED

Do derivative asylum claims survive the principal to present the type of live case or controversy which the Court discussed in *Spencer v. Kemna*, 523 US 1?

Should the provision in the Immigration and Nationality Act at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b) which bars from asylum those aliens who have "engaged in terrorist activities," be struck out as unconstitutionally vague or overbroad? In the alternative, should a less literal reading of the statute be employed, drawing on language outside the statute and conforming to principles of international law?

PARTIES TO THE PROCEEDINGS

The Petitioners in this case are Malachy McAllister, Nicola McAllister and Sean R. McAllister. The respondent is Alberto Gonzales, Attorney General of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS . . . . iii- iv

TABLE OF AUTHORITIES . . . . v –ix

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . 4

I. THE ASYLUM CLAIMS OF NICOLA McALLISTER AND SEAN McALLISTER WERE IMPROPERLY DISMISSED AS MOOT…………………………………….. 6

II THE STATUTE IS UNCONSTITUTIONALLY VAGUE AND/OR OVERBROAD……………….. 8

III THE RULES OF STATUTORY CONSTRUCTION COMPEL A MORE LIMITED STATUTORY REACH.................... 14

(A) A Literal Reading of the Statute Violates the Rule Against Absurd Conclusions........ 14

(B) According to the Rule of Lenity, the Statute Should be Read in a Manner Which Exempts Petitioner's Acts from its Provisions.......... 19

(C) A Literal Interpretation of the Statute Leads to a Violation of International Law........... 20

(D) The Dismissal of Petitioner's Claims of Entitlement to the Political Offense Exception Violates The Rule Against Redundancy........ 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page**

Andreiu v. Ashcroft,
253 F.3d 477, 482 (9th Cir. 2001)………………….. 10

Bailey v. U.S.,
516 U.S. 137, 145 (1995) ………………………... 26

Chew Heong v. United States,
112 U.S. 536 (1884)……………………………… 24

City of Chi. v. Morales,
527 U.S. 41, 56 (U.S. 1999)……………………… 11

Colautti v. Franklin,
439 U.S. 379, 390-391 (U.S. 1979)……………..... 11, 26

Commissioner v. Brown,
380 U.S. 563, 571, 14 L. Ed. 2d 75,
85 S. Ct. 1162 (1965)……………………………… 16

Connally v. Gen. Constr. Co.,
269 U.S. 385, 391 (1926)………………………….. 9

Cook v. United States,
288 U.S. 102, 120 (1933)…………………………. 22

County of Los Angeles v. Davis,
440 U.S. 625, 631 (1979)………………………… 7

Crowell v. Benson,
285 U.S. 22, 62 (1932)…………………………… 15

Duncan v. Walker,
533 U.S. 167 (U.S. 2001)............................... 28

Etuk v. Slattery,
936 F2d 1433.. 8

Fong Haw Tan v. Phelan,
333 U.S. 6, 10 (1948).............................. 5, 20,31

Gonzales v. Thomas,
126 S. Ct. 1613 (2006)................................. 4, 7

Grayned v. City of Rockford,
408 U.S. 104 (1972).................................... 10

Helvering v. Hammel,
311 U.S. 504, 510-511, (1941)........................ 16

INS v. Cardoza-Fonseca,
480 U.S. 421, 449 (1987).............................. 19, 25

INS v. Elias-Zacarias,
502 U.S. 478.. 30

INS v. Errico,
385 U.S. 214, 225 (1966).............................. 19

INS v. St. Cyr,
121 S.Ct. 2271, 2290 (2001).......................... 16, 19

In re Chapman,
166 U.S. 661, 667, 41 L. Ed. 1154, 17 S.
Ct. 677 (1897)... 15

Jarecki v. G. D. Searle & Co.,
367 U.S. 303, 307-308 (1961)........................ 26

Jordan v. DeGeorge,
341 U.S. 223, 231-32 (1951)........................ 10,11

Kolender v. Lawson,
461 U.S. 352, 357 (U.S. 1983)........................ 11

Kungys v. U.S.,
485 U.S. 759, 778 (1988)............................... 25, 30

Lau Ow Bew v. United States,
144 U.S. 47, 59 (U.S. 1892)............................. 15

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990)....................................... 7

Leocal v. Ashcroft,
543 U.S. 1, 12 (2004).................................... 20

Markham et al. v. Cabell,
306 U.S. 404, 409 (1945).............................. 26

McAllister v. Attorney General,
444 F.3d 178 (3d Cir. 2006)........................... *passim*

McCulloch v. Sociedad Nacional de
Marineros de Honduras,
372 U.S. 10, 21 (1963).................................. 21

Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64, 117-18 (1804) 21

Pennsylvania Department of Public
Welfare v. Davenport,
495 U.S. 552, 562, 110 S.Ct.
2126 (1990) 26

Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction,
43 Vand. L. Rev 1103 (1990) 21

Reno v. Anti American-Arab Discrimination Committee 26

Sorrells v. United States,
287 U.S. 435, 446 (U.S. 1932) 16

Spencer v. Kemna,
523 US 1, 18 (U.S. 1998) 4, 7

Swaby v. Ashcroft,
357 F.3d 156, 160 n.8 (2d Cir. 2004) 8

Talbot v. Seeman,
5 U.S. (1 Cranch) 1, 43-45 (1801) 21, 22

Thornhill v. Alabama,
310 U.S. 88, 97 (1940) 9

Trans World Airlines, Inc. v. Franklin Mint Corp.,
466 U.S. 243, 252 (1983) 22

United States v. Atchison, T. & S. F. R. Co.,
220 U.S. 37 (U.S. 1911) 15

United States v. Granderson,
511 U.S. 39, 56 (U.S. 1994) 15

United States v. Katz,
271 U.S. 354, 362 (1926) 16

United States v. Kirby,
7 Wall. 482, 486-487 (1869).............................. 16

United States v. Menasche,
348 U.S. 528, 538-539 (U.S. 1955)..................... 28, 31

United States v. Reese,
92 U.S. 214, 221, 23 L. Ed. 563 (1876).................... 14

United States v. Ryan,
284 U.S. 167, 175 (U.S. 1931)............................. 15

United States v. Thompson/Center Arms Co.,
504 U.S. 505, 517–518, and n. 10 (1992).................. 20

U.S. v. Wilson,
503 U.S. 329, 334... 10

Walters v. Metro. Educ. Enters.,
519 U.S. 202, 209 (1997) 26, 28.......................... 13

Weinberger v. Hynson, Westcott and
Dunning, Inc.,
412 U.S. 609, 633 (1973).................................. 31

Weinberger v. Rossi,
456 U.S. 25, 34 (1982) 21, 22

Welfare v. Davenport,
495 U.S. 552, 562 (1990).................................. 28

Whitney v. Robertson,
124 U.S. 190, 194 (1888).................................. 21

PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 14, Petitioners, Malachy McAllister, Nicola McAllister and Seān R. McAllister respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dismissing Petitioners' Petition(s) for Review is reported as *McAllister v. AG of the United States*, 444 F.3d 178 (3d Cir. 2006) and is reprinted in the Appendix hereto ("Pet. App.") at 1a-24a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 10, 2006. A petition for rehearing was denied on June 16, 2006 (App., infra, 24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Immigration and Nationality Act § 212 (a)(3)(B)(iii) [8 U.S.C. § 1182 (a)(3)(B)(iii)(V)(b)], is set forth in the Appendix to this Petition (Pet. App. 169a-170a), and provides in pertinent part:

"any activity which is unlawful under the laws of the place where it is committed. . . which involves . . . [using an] explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."

2. The case-or-controversy requirement is found at U.S. CONST. art. III, § 2. (Pet. App. 168a)

STATEMENT OF THE CASE

Malachy McAllister and his children Nicola and Sean McAllister are natives and citizens of Northern Ireland. In the early 1980s, Malachy became involved with the Irish National Liberation Army (INLA). In 1981, as a member of the INLA, he participated in two incidents. First, he acted as an armed lookout while other members of the INLA used firearms to shoot a Royal Ulster Constabulary (RUC) officer. Second, he acted as a member of a conspiracy to shoot and kill a RUC officer. For these actions, Malachy was ultimately convicted of "unlawful and malicious wounding with intent to do grievous bodily harm" and "conspiring to murder." He was sentenced to seven years incarceration for these offenses. On September 30, 1985, Malachy received an early release from prison for good behavior.

On December 15, 1988, Malachy, his wife, Sarah, and their children fled Northern Ireland to Canada following vicious attacks by Loyalist forces and the RUC. Loyalist paramilitaries had raked the family home with gunfire and the RUC threw Sarah out of a moving vehicle while she was pregnant. Malachy's asylum application in Canada was denied and he was ordered deported. On March 6, 1996, the McAllisters entered the United States as nonimmigrant visitors for pleasure. On March 5, 1999, the Immigration and Naturalization Service (INS) instituted removal proceedings against each member of the McAllister family. Malachy filed an application requesting asylum, withholding of removal, and withholding of removal under the Convention Against Torture (CAT). Sarah filed a similar application, with petitioners Nicola and Sean McAllister as derivative applicants.

On October 11, 2000, Immigration Judge Henry S. Dogin ("IJ") found that each member of the McAllister family was removable. The IJ denied all of Malachy's requested relief but granted asylum to Sarah and the children, Nicola and Sean. Malachy filed a timely appeal. The Office of Immigration Litigation (OIL) appealed the IJ decision concerning Sarah and the petitioner children. On November 17, 2003, the BIA issued two final orders of removal. In the first order, the BIA affirmed the IJ's determination that Malachy was removable on the grounds that he had engaged in terrorist activities. *See* 8 U.S.C. § 1227(a)(4)(B). The BIA also affirmed the IJ's denial to him of relief from removal.

In the second order, the BIA affirmed the IJ's determination that Sarah, Nicola and Sean were removable for overstaying their visas. The BIA, however, reversed the IJ's grant of asylum to Sarah, Nicola and Sean and denied all their other requests for relief, except for voluntary departure. The McAllisters appealed and their appeals were consolidated.

On May 10, 2004, Sarah died of cancer. On July 1, 2004, Nicola and Sean filed a Motion to Reopen the November 17, 2003, Order of the BIA so that they could independently file applications for asylum and for relief under CAT. On August 3, 2004, the BIA denied their motion because it was not timely filed. *See* 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(2). On September 16, 2004, Nicola and Sean filed a petition for review of the BIA's August 3, 2004 decision.

The Third Circuit Court of Appeals denied Malachy McAllister's petition to review the BIA's determination that he was removable for having engaged in terrorist activities and to review BIA's denial of asylum, withholding of removal, deferral of removal, and remand. The Third Circuit also dismissed the petitions for review of Nicola and Sean McAllister for lack of jurisdiction.

REASONS FOR GRANTING THE PETITION

The conclusion of the Third Circuit Court of Appeals that Nicola and Sean McAllister's asylum claims were moot departs from this Court's decisions in *Spencer v. Kemna*, 523 US 1 and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006).

Secondly, this case presents an important question of federal law that has not been, but should be, decided by the Honorable Supreme Court. A determination that an individual may be labeled as an alien who has "engaged in terrorist activities" [8 U.S.C. §1182(a)(3)(B)(iii)(V)(b)] is a matter of considerable constitutional importance, touching upon an individual's liberty and due process rights, as well as testing our nation's commitments to international treaty obligations. Such a finding deprives an alien of all relief under the Immigration and Nationality Act ("INA"), including its asylum provisions[1], threatening his or her liberty. An alien who has been severely persecuted, or faces a likelihood of persecution in his or her home country, is nevertheless denied the protection of our asylum laws if it is determined that s/he has "engaged in terrorist activities."

It is respectfully submitted, therefore, that the statutory construction of the anti-terrorism provisions of 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b) is a matter for this Court's jurisdiction. To adequately protect an alien's right to asylum and freedom from persecution, according to the treaty obligations of the United States, it is essential that the term "engaged in terrorist activities" is clear as to its application, lest deserving asylum seekers are erroneously designated terrorists.

---

[1] An alien is not eligible for asylum if the Attorney General determines "there are reasonable grounds for regarding the alien as a danger to the security of the United States," or that "the alien is described in . . . section 1227(a)(4)(B) of [Title 8] (relating to terrorist activity)." 8 U.S.C. § 1158(b)(2)(A)(iv)-(v). *McAllister v. AG of the United States*, 444 F.3d 178, 188 (3d Cir. 2006).

Petitioner submits that the provision is anything but clear, and should be struck out as unconstitutionally vague and/or overbroad. In the alternative, Petitioner respectfully requests that the Court employ tried and tested rules of statutory construction to limit the breadth of the statute's reach. *See Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948), which holds that a statutory provision might be interpreted "generously" when "the stakes are considerable" for noncitizens. In particular, Petitioner submits that a commonsense interpretation of what constitutes "terrorist activities," consistent with Congressional intent and the nation's commitments under international law, viewed in light of the definitions of "terrorism" and the "political offense exception," found elsewhere in the U.S. Code, will exempt individuals like Petitioner who have carried out such activities in the course of war or armed conflict.

In particular, Petitioner had asserted in the Court below that the Board of Immigration Appeals ("BIA") erred in finding that he had "engaged in terrorist activities" as it did not consider whether or not he had targeted noncombatants, or whether the situation in Northern Ireland had risen to an Article 3 conflict. The BIA stated that it lacked jurisdiction, according to well-settled law, to rule on the constitutionality of the Immigration and Nationality Act ("INA") and regulations thereunder. (Pet. App. 45-a). The Third Circuit Court agreed that the INA's definition of "having engaged in terrorist activity" does not address the targeting of non-combatants or the level of conflict under the Geneva Convention. Accordingly, Petitioner submits that the

Honorable Supreme Court is the only Court which can rule on such constitutional matters, and matters of statutory construction, which McAllister has raised.

Similarly, the Third Circuit found that the BIA properly declined to address McAllister's argument under the "political offense exception." In response to McAllister's claims of an exemption for his acts under the political offense exception, the BIA simply stated that "[t]he question whether these convictions are excepted from the inadmissibility grounds as 'purely political offenses' lies in a largely unchartered area of the law." As the Third Circuit has declined to address this argument, Petitioner has no means of review of this concept other than through the Honorable Court.

I. THE ASYLUM CLAIMS OF NICOLA McALLISTER AND SEAN McALLISTER WERE IMPROPERLY DISMISSED AS MOOT

Petitioners Nicola and Sean McAllister submit that the denial of their derivative asylum claims by the BIA on November 17, 2003 was the subject of a timely filed Petition for Review [Docket # 03-4513]. Regardless of whether or not the BIA's denial of Petitioners' subsequent Motion to Reopen [Docket # 04-3695] was properly reviewable, Petitioners submit that their asylum claims did not become moot upon the demise of their mother, especially in light of this Court's recent decision in *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006), as a live issue or controversy in their case remains.

The Third Circuit Court found that when a case or controversy ceases to exist between the parties, the case is rendered moot, as per *Spencer v. Kemna*, 523 US 1, 18 (U.S. 1998), and that, accordingly, Sarah McAllister's claim became moot when she passed away. (Pet. App. 8a-9a). However, in regard to the Petitioners' claims, the Supreme Court in *Spencer v. Kemna* also found that where a live issue or controversy remains, a case is not rendered moot. *Spencer supra.* at 7.

This Court in *Kemna* held that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate" and that "[t]he parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id.* The Court explained that "this means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.''" *Id.*

The question of mootness, properly framed here, is whether the demise of Petitioners' mother Sarah, caused their November 21, 2003 Petition for Review to become moot because it no longer presented a case or controversy under Article III, §2, of the Constitution. The answer compelled by *Spencer* is that it did not. *See also Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) ["in assessing whether a case is moot, we must examine all the facts and circumstances"]; *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) ["the party seeking to have the case dismissed bears the burden of demonstrating mootness and that burden 'is a heavy one.'"]

This view is akin to the finding of several Circuit Courts that habeas petitions are not moot, so long as collateral consequences remain. *See Swaby v. Ashcroft*, 357 F.3d 156, 160 n.8 (2d Cir. 2004) [holding that a habeas petition filed by an alien under IIRIRA's judicial review provisions was not mooted by deportation because a collateral consequence of that deportation—a lifetime bar to entering the United States—was sufficient to maintain a live case or controversy]; *Etuk v. Slattery*, 936 F2d 1433 [the 'case or controversy' requirement subsists through all stages of federal judicial proceedings, trial and appellate].

Petitioners continued to retain a personal stake in the Petition for Review [Docket # 03-4513]. They were explicitly and individually granted asylum by the Immigration Judge, based on findings that they had suffered severe past persecution as members of the McAllister family. (Pet. App. 146a-157a, 166a)

The fact that Petitioners technically filed applications as derivative applicants, when they had valid independent claims that were subsequently and explicitly recognized by the Immigration Judge, should not automatically eliminate their rights to protection under the INA and pursuant to the Refugee Convention. In fact, the regulations at 8 C.F.R. § 1208.24(d) make it clear that "termination [of asylum status for the principal applicant] shall not preclude the spouse or child of such alien from separately asserting an asylum or withholding of deportation or removal claim." There is nothing in the statutory language that requires that such an independent claim must be made in the context of a motion to reopen. Therefore, the claims of Sean and Nicola McAllister remained alive, based on the timely filed petition for review of the BIA's denial of their claims on November 17, 2003.

II THE STATUTE IS UNCONSTITUTIONALLY VAGUE AND/OR OVERBROAD

Petitioner Malachy McAllister submits that the statutory provision at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b) is unconstitutional as vague and/or overbroad. The Third Circuit Court discussed the test for a statute which is unconstitutional for vagueness:

> A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926)). A statute is unconstitutionally overbroad if it "does not aim specifically at the evils within the allowable area of control [by the government] but . . . sweeps within its ambit other [constitutionally protected] activities." *Id.* at 212 n.5 (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940)).

McAllister v. Attorney General, 444 F.3d 178 (3d Cir. 2006). (Pet. App. 11a-12a)

The definition of having "engaged in terrorist activities," - then, includes any alien whom the Attorney General determines has ever unlawfully engaged (much less been convicted) anywhere, at any time, in any use of any firearm, other weapon or dangerous device (other than for monetary gain), with "intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property," including "a threat, attempt or conspiracy to do any of the foregoing."

The definition covers just about anyone who has ever committed a violent crime (not for monetary gain), who has ever used a "dangerous device," which is nowhere defined. The alien need not be a member of any organization, and need not have any political or other motive for the offense. *McAllister, supra* at 187. (Pet. App. 14a). Indeed, the alien need not cause harm to any person at all; under this rubric, damage to property is sufficient. Furthermore, no exception has been provided for carrying out such activities in the course of a war or insurgency. *Id.*

The plain meaning of the language in a regulation governs "unless it would lead to an absurd result." *Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001*)[citing U.S. v. Wilson*, 503 U.S. 329, 334]. Conversely, if a statute's provisions are not clearly defined, the court must invalidate the provision. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

In the case at bar, Petitioner submits that the language is far from clear on its face and will lead to absurd results which Congress could not have intended, and the statute must be invalidated. In the alternative, other provisions of the INA, such as the "political offense exception," or utilizing the definition of "terrorism" found elsewhere in the U.S. Code, viewed in light of U.S. obligations under international law, can limit the breadth of the statute and save it from absurdity.

The concept of vagueness has been used to test the constitutionality of criminal provisions in the context of criminal laws: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chi. v. Morales*, 527 U.S. 41, 56 (U.S. 1999), *citing Kolender v. Lawson*, 461 U.S. 352, 357 (U.S. 1983) (standing for the proposition that "the void-for-vagueness doctrine requires that a . . . statute define the . . . offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); *see also Colautti v. Franklin*, 439 U.S. 379, 390-391 (U.S. 1979) (stating "it is settled that, as a matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness") (internal citations and quotations omitted).

Whereas deportation proceedings are civil, rather than criminal, proceedings, the effects of enforcement can be very similar. *See Jordan v. De George,* 341 U.S. 223, 243 (1951) (finding that "deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.").

By including such a wide array of activity which does not comfortably fall within the traditional understanding of the words "terrorist activities," the definition at 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) permits, indeed encourages, "arbitrary and discriminatory enforcement." Bar the exemption for those who use firearms etc. for monetary gain, an extraordinarily wide range of individuals will have unknowingly "engaged in terrorist activities." According to this definition, the Attorney General has the authority and complete discretion to arrest, detain, and deport, for "engaging in terrorist activity," anyone who has ever in his/her lifetime committed an illegal act using a weapon with the intent to harm another or another's property.

Those multitudes of "persons of ordinary intelligence" around the globe who have unwittingly "engaged in terrorist activities," have not been given fair notice that their contemplated conduct would retroactively be deemed terroristic, subjecting them to the harshest of sanctions within our nation's immigration laws, including a bar to asylum or any other immigration benefits, as well as the threat of arrest and detention pending deportation.

The Third Circuit Court clearly was concerned with the breadth of the language, when it stated that 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) "includes a great deal of conduct" and "encompasses more conduct than our society, and perhaps Congress, has come to associate with traditional acts of terrorism e.g. car bomb and assassinations." Nevertheless, the Court found that "all of this conduct could reasonably constitute terrorist activity." (Pet. App. 12-14a)

Petitioner submits, however, that the latter finding is conclusory, and that there remains a multitude of crimes against the person and against property, that would not "reasonably constitute terrorist activity." Apart from robbery and burglary, basically any crime of violence, whether against the person or against property, can readily be deemed to be a "terrorist activity." This cannot be what Congress intended.

The reach of this statutory provision is further broadened in light of the Third Circuit Court's finding that the INA does not expressly require the organization, with which the alien was acting, to be a terrorist organization. Furthermore, the statute provides that an alien may act in an individual capacity when engaging in terrorist activities. 8 U.S.C. § 1182(a)(3)(B)(vi). This provides the statute with an extraordinarily broad reach. The anti-terrorism provisions could include not only members of, for example, the United Nations or the Red Cross, but any individual acting alone. The definition of "organization" at 8 U.S.C. § 1182(a)(3)(B)(vi) appears, therefore, to be entirely superfluous.

Whereas the Third Circuit Court dismissed Petitioner's examples illustrating the broad reach of the statute,[2] these examples occupied the outer ring of offenses which could lead to absurd results, and were by no means exhaustive. The Court found that the activities in the examples provided would not be "unlawful" as the *mens rea* would not be present. However, the Third Circuit's analysis presupposes that the state in which such offenses occurred recognizes such common law concepts. Per the statutory provision at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), terrorist activity includes "any activity that is unlawful *under the laws of the place where it is committed*"(emphasis added). So, in the example provided of the woman protecting herself against a domestic violence attack, if she is from a country where women's rights are subjugated and she may not avail of a self-defense exception, then her acts are unlawful in her home country and they become terroristic. No exceptions are provided for acts occurring in legal systems which we in the United States may find abhorrent.

---

[2] The examples were an 8-year-old child who brings a baseball

Petitioner further submits that the breadth of this definition of "terrorist activity" is not only unconstitutionally overbroad and vague, but potentially dangerous. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *City of Chi.* at 60, *quoting United States v. Reese*, 92 U.S. 214, 221 (1876) (finding that to permit such would "certainly be dangerous" and would "substitute the judicial for the legislative department of the government"). "[I]f [Congress] steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and

---

bat to school to protect himself from bullies; an individual institutionalized for a mental health disorder who attacks a doctor; a woman who protects herself, in the course of a domestic violence attack, with standard kitchen cooking utensils. (Pet. App. 13a) when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people." *Id.* at 221.

With the provision in question, Congress effectively has empowered the Department of Homeland Security, acting under the enforcement powers formerly designated to the Attorney General, to haul in the dolphin with the tuna, and granted permission to club the dolphin. It is respectfully submitted that Congress did not intend the legislation to sweep so broadly. However, if the lower Court's definition is correct, then the conclusion that the language is unconstitutionally vague or overbroad is compelling. Unless the language of the statute is in some way limited or modified according to the rules of statutory construction, it clearly has the potential to lead to unwarranted or absurd results.

III THE RULES OF STATUTORY CONSTRUCTION COMPEL A MORE LIMITED STATUTORY REACH

(A) A Literal Reading of the Statute Violates the Rule Against Absurd Conclusions

As discussed above, if the statute is not modified, absurd results are sure to follow. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897). *See also United States v. Granderson*, 511 U.S. 39, 56 (U.S. 1994); *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (U.S. 1892) (standing for the proposition that a court, in the interpretation of a statute, should come to "a sensible construction that avoids attributing to the legislature either an unjust or an absurd conclusion."); *see also United States v. Atchison, T. & S. F. R. Co.*, 220 U.S. 37 (U.S. 1911) (stating that in interpreting a statute "a sensible construction should be adopted and one not leading to any unreasonable or absurd consequences").

Accordingly, a statute which may be unconstitutional may be saved if another construction is possible. "[I]t is a cardinal principle" of statutory interpretation, however, that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

In this case, a less literal interpretation may save the statute from absurdity: "A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States v. Ryan*, 284 U.S. 167, 175 (U.S. 1931); *see also United States v. Katz*, 271 U.S. 354, 362 (1926) ["In a case such as this, in which a literal interpretation of a statutory provision may indeed lead to absurd consequences...we must look beyond the terms of the provision to the underlying congressional intent"]; *See also, e.g., Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (recognizing "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute'"), *quoting Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941); *see also Sorrells v. United States*, 287 U.S. 435, 446 (U.S. 1932) ("Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned").

It is also settled, in statutory interpretation, that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *United States v. Kirby*, 7 Wall. 482, 486-487

(1869). "It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *Id.* Further, "general terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation." *Sorrells, supra* at 447-448.

The Court in *INS v. St. Cyr*, 533 U.S. 289, 299 (U.S. 2001) raised similar canons, applicable here: "First, when a statutory interpretation invokes the outer limits of Congress' power, there must be a clear indication that Congress intended that result; and second, if an otherwise acceptable construction would raise serious constitutional problems and an alternative interpretation is fairly possible, the statute must be construed to avoid such problems."

In his argument below, Petitioner posited an approach which would lead to a less literal, and more common-sense, approach to the conundrum, namely, that the Courts, in defining "engaging in terrorist activities" adopt a definition of "terrorism" found elsewhere in the U.S. Code, under which the definition of having "engaged in terrorist activities" would more comfortably fit. (Pet. App. 15a, 43a, 101a-105a, 107a -109a)

The House and Senate Conference Committee which crafted the anti-terrorism language in the INA had difficulties agreeing on what was meant by "terrorism." Most significantly, the Committee referred to the definition of terrorism contained in 22 U.S.C.§ Section 2656(d) to inform the definition in the INA, now found at 22 USCS § 2656f(d)(2). *See also* 18 USCS § 2331 (2005).

The relevant statutes define "terrorism" as "premeditated, politically motivated violence perpetrated against *noncombatant* targets by subnational or clandestine agents." [See 22 USCS § 2656f(d)(2); H.R. Conf. Rep.No. 101-955, at 131 (1990).] (Emphasis added). As a matter of statutory construction, it may also be presumed that Congress was aware of this interpretation of "terrorism."

This method of interpretation is by no means a stretch. The statute at 8 USCS § 1189 designates "foreign terrorist organizations" for the purposes of the INA, and finds that a "foreign terrorist organization" is one that "engages in terrorist activity" (as defined at 8 USCS § 1182(a)(3)(B)) or "terrorism" [as defined at 22 U.S.C. 2656f(d)(2)].

The "extreme or absurd consequences" in the matter at bar are highlighted by the fact that the Petitioner, Malachy McAllister, is barred from asylum as someone who had "engaged in terrorist activities" arising from acts which has no bearing on the safety and security of the United States. As the Third Circuit Court set forth, "no one now suggests that Malachy poses a threat to anyone, much less to our national security, but this is a fact that Congress does not permit us to consider." The Court was also concerned with the dichotomy between the activities at issue and the statute:

> Additionally, I cannot help but observe that Malachy's acts, and the ensuing conviction on which the findings of removability and ineligibility for asylum or any other relief was based, bear no relation to any common-sense understanding of what "terrorist activity" really is or should be. Because, however, Congress has defined "terrorist activity" and "engage in terrorist activity" so broadly, it is game, set, and match.

McAllister v. AG of the United States, 444 F.3d 178, 192 (3d Cir. 2006) (Barry, J., Concurring). (Pet. App. 23a).

Nevertheless, Petitioners' activities aside, there are many other examples of a literal reading of the statute leading to absurd results. In her concurring opinion, Justice Barry notes that, under this definition "to assist a suicide by knowingly providing the weapon used would be to 'engage in terrorist activity,' as would swinging a baseball bat at someone during a bar-room brawl, as would teenage gang members planning to go after a rival gang and use their knives if necessary." *Id.* Clearly, while all of these certainly are examples of criminal behavior, they do not describe what the common man understands to be terrorist activity, and the range of offenders who may potentially fall within this definition is extraordinary.

It should be axiomatic that the above examples are absurd results which Congress never intended to fall under the definition of "engaging in terrorist activities." A literal application of the statute potentially can produce unjust results and lead to injustice, oppression and absurdity. A reasoned application, however, consistent with the statute's legislative purpose, and a common-sense definition of "terrorism," as discussed above, would read implied exceptions into the "letter" of the law where otherwise applying it literally would not further the legislative purpose, but rather result in injustice.

Such a common-sense interpretation of "terrorism" as proposed also is entirely consistent with the political offense exception to crimes of moral turpitude, found elsewhere in the Immigration and Nationality Act.

(B) According to the Rule of Lenity, the Statute Should be Read in a Manner Which Exempts Petitioner's Acts from its Provisions

The rule of lenity is a longstanding canon of statutory construction which provides that if any doubts exist as to the proper interpretation of a statute, the ambiguity must be construed in favor of the alien. *INS v. St. Cyr*, 121 S.Ct. 2271, 2290 (2001) (citing the "presumption against retroactive application of ambiguous statutory provisions, buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" [quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)]). *See also INS v. Errico*, 385 U.S. 214, 225 (1966) (applying rule to provisions relating to relief); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (resolving doubts in statutory construction in favor of alien "because deportation is a drastic measure and at times the equivalent of banishment or exile").

The rule of lenity, in another of its applications, may also allow recourse to other statutes or statutory provisions as an aid to interpretation. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) [if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute even in immigration cases "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context"]; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–518, and n. 10 (1992) (employing the rule of lenity to interpret "a tax statute . . . in a civil setting" because the statute "has criminal applications"); *id.*, at 519.

Here, as discussed above, the Petitioner seeks a construction which applies to the exclusion statute a common sense definition of "terrorism" found at 22 U.S.C. 2656f(d) and referenced at 28 USCS § 1182(a)(3)(B) and 18 USCS §

2331 (2005). This definition of "terrorism" would illuminate the exclusion statute in a way which gives substance to Congressional intent, and would not conflict with either the "political offense exception," nor this country's obligations under the Refugee Convention and other canons of international law.

(C) A More Literal Interpretation of the Statute Leads to a Violation of International Law.

A literal interpretation of the statute conflicts with U.S. obligations under international law as set forth in the Refugee Convention and 1967 Protocol, codified and incorporated into U.S. law, as well as the Geneva Convention, customary international law and the *jus cogens* protection against the *refoulement* of refugees. However, as discussed above, a reasonable alternative construction of having "engaged in terrorist activities" is possible, where "terrorism" is defined, and which does not violate international laws.

In the absence of a clear congressional statement to the contrary, longstanding norms of statutory construction require that statutes be construed in conformity with international law whenever possible. *Weinberger v. Rossi*, 456 U.S. 25, 34 (1982) [Citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)]. *See also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing a labor relations statute so as not to violate customary rules of maritime jurisdiction); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (courts should "endeavor to construe" statutes so as to avoid conflict with international law, "if that can be done without violating the language of either."). *See generally* Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Vand. L. Rev 1103 (1990).

This has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), finding that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *See also Weinberger, supra* at 32 (U.S. 1982) "By this construction," Chief Justice Marshall concluded, in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43-45 (1801) , "the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred."

In particular, statutes should be presumed to conform to international law unless Congress has expressed a clear intent to the contrary. The "extraordinary intent" of Congress to violate the law of nations must be "plainly expressed" to be given effect by the courts. *Weinberger v. Rossi, supra.* at 119. Legislative silence alone is not sufficient to abrogate the United States' international obligations. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1983) ("There is ... a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.").

Accordingly, the provisions at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b) cannot be read to conflict with the Refugee Convention and 1967 Protocols, or the Geneva Convention. This canon would allow the Honorable Court to read a common-sense exemption into the anti-terrorism provisions for those who have engaged in war, armed conflict, or who are entitled to the "political offense exception" found elsewhere in the Immigration and

Nationality Act, by adopting the definition of "terrorism" proposed by Petitioner. Otherwise, the statute risks violating the treaty principles which this country adopted following the Refugee Convention, as well as the Geneva Convention, and protocols thereto.

The lower Court's more literal interpretation did not employ such considerations of international law, and found that, as the INA's definition of engaging in terrorist activity does not address either the targeting of non-combatants or the levels of conflict under the Geneva Convention: "Petitioner's proffered distinctions between combatant and non-combatant and Article 3 verses non-Article 3 conflict are not sustainable, and the BIA did not err." (Pet. App. 15a).

However, it is respectfully submitted that Congress must have intended that those who participated in war or lawful armed struggle against oppressive regimes would be exempted from the definition of having "engaged in terrorist activities," in accordance with the Geneva Convention and Protocols thereto.

This anomaly was addressed in a recent BIA case, concurring with the holding in *McAllister*, concerning a native of Burma charged with having provided material support to a terrorist organization who claimed to face persecution and/or torture if returned to Burma, currently ruled by a military dictatorship:

> Yet, the statutory language [at Section 212(a)(3)(B)(iv)(VI)(bb)] is breathtaking in its scope. Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist

> organizations because their activities coincide with our foreign policy objectives. For example, the DHS conceded at oral argument that an individual who assisted the Northern Alliance in Afghanistan against the Taliban in the 1990s would be considered to have provided "material assistance" to a terrorist organization under this statute and thus would be barred from asylum. This despite the fact that the Northern Alliance was an organization supported by the United States in its struggle against a regime that the United States and the vast majority of governments around the world viewed as illegitimate.

Matter of S-K-, 23 I&N Dec. 936, 2006 BIA LEXIS 11, 30 (BIA 2006)

The BIA also found that the definition also includes groups and organizations that are not normally thought of as "terrorists" per se and that "[r]ead literally, the definition includes, for example, a group of individuals discharging a weapon in an abandoned house, thus causing "substantial damage to property." *Id, citing McAllister v. Attorney General*, 444 F.3d 178.

In this instance, Petitioner is not asking the Court to add a term where Congress omitted it, but rather to look to international law to more clearly define what constitutes "terrorism" or "terrorist acts," and what constitutes "war" or "legitimate armed conflict," to make sense of what Congress intended.

Another means to avoid a conflict is for the Courts to refuse to apply a statute retroactively. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Supreme Court created an exception to a statutory scheme in order to avoid a conflict with an earlier internationally binding treaty. The Court emphasized that "courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.* at 559.

The presumption against retroactive application of ambiguous statutory provisions also is buttressed by "the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S., at 357–358 (*quoting Landgraf* , 511 U.S., at 270). As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.*

D. The Dismissal of Petitioner's Claims of Entitlement to the Political Offense Exception Violates The Rule Against Redundancy

The rule against redundancy holds that it is impermissible for one statutory provision to eviscerate another. *See, e. g., Kungys v. U.S.*, 485 U.S. 759, 778 (1988) "it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." A law will not be strictly read if such reading would result "in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham et al. v. Cabell*, 306 U.S. 404, 409 (1945). See also *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961). "No canon of statutory construction familiar to me specifically addresses the situation in which two simultaneously enacted provisions of the same statute flatly contradict one another." *Reno v. Anti American-Arab Discrimination Committee.*

A related general rule of construction is that a legislature is presumed not to use any superfluous language. *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). The courts will not read statutes to render language in the statute superfluous. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126 (1990) ["Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."]. "[S]tatutes should be interpreted, whenever possible, to give every word and phrase some operative effect. See *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209, 117 S.Ct. 660, 136 L.Ed 2d 644 (1997) (explaining this point).

In the case at bar, Petitioner submits that the provision at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), holding an alien inadmissible for having "engaged in terrorist activities," entirely eclipses the "political offense exception" ("POE") to crimes of moral turpitude found at 8 U.S.C. §1182(a)(2)(A)(i)(I). Any alien who could otherwise assert the POE can simply be charged in the alternative as inadmissible under 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), and the POE is neutered. There is no conceivable crime against the person crime of moral turpitude which could benefit from the "political offense" which cannot otherwise be determined to be a terroristic offense.

Specifically, Petitioner Malachy McAllister had asserted that he was entitled to the exemption of the "political offense exception" to inadmissibility found at 8 U.S.C. §1182(a)(2)(A)(i)(I), one of the original charges of inadmissibility. The import of his argument was not to insert the POE in a provision where it did not exist but, rather that if he was entitled to the POE, he could not also have engaged in terrorist activities under 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), without rendering the POE meaningless and redundant. The BIA determined that, as it had found him to be inadmissible under 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), it had no further need to review the section relating to the "political offense exception."

In its decision dated April 10, 2006, the Third Circuit Court found that the BIA properly declined to address McAllister's argument, and held that "none of the provisions containing the term 'political offense' pertain to or refer to provisions involving terrorist activities" and further found that "the 'political offense' exception was a limited exception that applied only to the specific subsections in which it was found and thus did not apply to terrorist activities." (Pet. App. 16a).

Both the Third Circuit and the BIA found to the effect that the statutory provisions of INA §237(a)(4)(B) reveals that "Congress did not include an exception to removability for terrorist activities that, in other contexts, may be deemed political offenses." However, the fact that Congress did not include an exception on this ground is not dispositive, and Petitioner did not ask the lower Courts to read the exception into the statute.

Instead, Petitioner submits that the BIA and the lower Court implicitly have conceded that the political offense exception has been eclipsed by the anti-terrorist provisions at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b). Wherever else the POE is found in the INA, its utility will be superseded by 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b), so long as the latter is invoked.

However, absent the express will of Congress, the political offense exception may not be subject to preclusion, and the two statutory provisions must be read in a light which makes sense of both concepts. Otherwise, the application of an interpretation of one principle which would render the other invalid, insignificant or selectively inapplicable violates the rule against redundancy. "It is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section, as the Government's interpretation requires." United States v. Menasche, 348 U.S. 528, 538-539 (U.S. 1955) (internal quotations omitted).

Selective application violates the principle requiring that all clauses and provisions in a statute are given operative meaning. *United States v. Menasche, supra; Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); Duncan v. Walker, 533 U.S. 167 (U.S. 2001)("we are reluctant to treat statutory terms as surplusage in any setting"). The Court below did not address how the POE may survive when a simultaneous charge of having "engaged in terrorist activities" has been proferred.

Consigning the POE to irrelevancy is especially inappropriate given the importance of the exception within the context of eligibility for asylum in general. See Duncan, *supra* ("This is especially so when the term occupies so pivotal a place in the statutory scheme"). Not only is the POE fundamental to a finding or denial of asylum in general, it is inseparable from the applicable circumstances in this case affecting the Petitioner.

This is not merely an academic argument. One of the grounds under which Malachy McAllister was found to be ineligible for asylum was for having committed a "serious nonpolitical offense." The Immigration Court found that there were serious reasons for believing that Mr. McAllister committed "serious nonpolitical crimes" outside of the United States prior to his arrival and was therefore statutorily barred from asylum pursuant to INA § 208(b)(2)(A)(iii). Pet. App. at 116a -117a).

Petitioner submits that if the definition of "engaging in terrorist activities" continues to enjoy a broad reading, and eviscerates the political offense exception, found elsewhere in the statute, then the statute is in violation of this country's obligations under international law. However, as the statutory meaning of 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b) is unclear, the "political offense exception" can help in limiting its application[3].

In particular, the political offense exception derives authority from the 1951 Convention Relating to the Status of Refugees (the "Convention"), Section F of Article 1, which holds that a person otherwise having the characteristic of a refugee may nevertheless be excluded from refugee status, enumerating those categories of persons who are not considered to be deserving of international protection.

However, Article 1 F(b) states that the exclusionary provisions of the Convention shall not apply to any person with respect to whom there are "serious reasons for considering that he has committed a serious *non-political* crime outside the country of refuge prior to his admission to that country as a refugee." *Id.* [Emphasis added]. This is encoded in our immigration laws at INA §208(b)(2)(A)(iii). Clearly, under international law, the signatories to the Convention contemplated that political crimes may not bar an individual from a grant of asylum.

---

[3] As the IJ found, McAllister was "afforded political prisoner status and housed in the Republican wing with other INLA and IRA members." (Pet. App. 73a).

If the anti-terrorism provisions are interpreted to exclude the POE, then the purposes of the Refugee Act will have abrogated, and will be inconsistent with U.S. obligations under the Refugee Convention. The dangers are obvious. As this Court set forth in *INS v. Elias-Zacarias*, 502 U.S. 478: "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.".

In view of the foregoing, Petitioner respectfully requests that the Honorable Supreme Court find this application to be contrary to the well settled principle that "no provision should be construed to be entirely redundant," *Kungys v. U.S.*, 485 U.S. 759, 778 (1988).

If an alien in McAllister's position cannot avail of the 'political offense exception' to negate the consequences of his convictions in the context of removal, then the term has no further meaning. As Congress did not remove the political offense exception from the statute then it must have intended for its application, and the provisions of INA §237(a)(4)(B) cannot simply trump the exception out of existence, without offending "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973); *see* *also United States v. Menasche*, 348 U.S. 528, 538-39 (1955)[It is a court's duty "'to give effect, if possible, to every clause and word of a statute.'"]

The stakes are high, and the definition deserves clarity. As this Court pointed out in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10,

> "...deportation is a drastic measure and at times the equivalent of banishment or exile...[i]t is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (citation omitted).

CONCLUSION

For all the reasons stated above, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Eamonn Dornan, Esq.
SMITH DORNAN & DEHN P.C.
110 East 42nd Street, # 1303
New York, NY 10017
Tel: (212) 370-5316

September 14, 2006

APPENDIX

PETITIONER'S APPENDIX
TABLE OF CONTENTS

Page

McAllister v. AG of the United States
444 F.3d 178 (3d Cir. 2006)............................... 1a-24a

Board of Immigration Appeals Decision
In re: Nicola McAllister, Sean R. McAllister
Dated, August 3, 2004................................ 25a-31a

Board of Immigration Appeals Decision
In re: Sarah B. McAllister, Paul Gary McAllister, Nicola McAllister, Sean R. McAllister
Dated, November 17, 2003............................... 32a-38a

Board of Immigration Appeals Decision
In re: Malachy McAllister, Paul Gary McAllister, Nicola McAllister
Dated, November 17, 2003...............................39a-51a

Immigration Court, Newark, New Jersey. Decision
In re: Malachy McAllister, Sarah B. McAllister, Paul Gary McAllister, Mark J. McAllister, Nicola McAllister, Sean R. McAllister
Dated, October 10, 2000.................................52a-166a

United States Court of Appeals for the Third Circuit
Decision regarding Petition for Rehearing
Dated, June 16, 2006...167a

STATUTORY PROVISIONS.......................168a-170a

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4513/04-3695

MALACHY MCALLISTER; *MARK J. MCALLISTER;
SARAH B. MCALLISTER;
PAUL GARY MCALLISTER; NICOLA MCALLISTER;
SEAN R. MCALLISTER,

Petitioners in 03-4513

v.

Attorney General of the United States,

Respondent.

*Dismissed Pursuant to Court's Order dated 1/13/04

NICOLA MCALLISTER
SEAN R. MCALLISTER

Petitioners in 04-3649

v.

Attorney General of the United States

Petition for Review of an Order of the
Board of Immigration Appeals

(Agency Nos. A73 629-577; A73-551-831; A73 551-832,
A73-551-833; A73 551 834; A73 551-835)

Argued on June 29, 2005

BEFORE: ROTH, RENDELL and BARRY, Circuit Judges

(Filed: April 10, 2006)

Eamonn S. Dornan, Esquire (ARGUED)
Smith Dornan & Dehn, P.C.
110 East 42nd Street, Suite 1303
New York, NY 10017
Counsel for Petitioners

Peter D. Keisler, Esquire
Assistant Attorney General
Michael P. Lindemann, Esquire
Assistant Director
John M. McAdams, Jr. Esquire (ARGUED)
Douglas E. Ginsberg, Esquire
Office of Immigration Litigation
Civil Division
United States Department of Justice
PO Box 878, Ben Franklin Station
Washington, D.C. 20044

Counsel for Respondent

OPINION OF THE COURT

ROTH, Circuit Judge:

We review here two decisions of the Board of Immigration Appeals (BIA). In the first, the BIA found that Malachy McAllister (Malachy) was removable because he had engaged in terrorist activities. *See* 8 U.S.C. § 1227(a)(4)(B). The BIA also denied all of Malachy's requests for relief from removal. In the second, the BIA found that Malachy's wife, Sarah McAllister (Sarah), and their four children, Nicola, Sean, Mark and Paul Gary, were removable because they had overstayed their visas.[1] *See* 8 U.S.C. § 1227(a)(l)(B). The BIA granted Sarah and the children voluntary departure but denied all other relief from removal.

I. Facts

The McAllisters are natives and citizens of Northern Ireland in the United Kingdom. In the early 1980s, Malachy became involved with the Irish National Liberation Army (INLA). In 1981, as a member of the INLA, Malachy participated in two incidents. First, he acted as an armed lookout while other members of the INLA used firearms to shoot a Royal Ulster Constabulary (RUC) officer. Second, he acted as a member of a conspiracy to shoot and kill a RUC officer. For these actions, Malachy was ultimately convicted of "unlawful and malicious wounding with intent to do grievous bodily harm" and "conspiring to murder." He was sentenced to seven years incarceration for these offenses. On

---

[1] This appeal does not involve Mark

September 30, 1985, Malachy received an early release from prison for good behavior.

On December 15, 1988, Malachy, Sarah and their children left Northern Ireland for Canada. The family fled Northern Ireland following vicious attacks by Loyalist forces and the RUC. For example, Loyalist paramilitaries raked the family home with gunfire and the RUC threw Sarah out of a moving vehicle while she was pregnant. Malachy applied for asylum in Canada but it was denied and he was ordered deported. On March 6, 1996, Malachy and his family entered the United States as nonimmigrant visitors for pleasure. On March 5, 1999, the Immigration and Naturalization Service (INS) instituted removal proceedings against each member of the McAllister family. Malachy filed an application requesting asylum, withholding of removal, and withholding of removal under the Convention Against Torture (CAT). Sarah filed a similar application, with each of her children as a derivative applicant.

II. Procedural History

On October 11, 2000, an Immigration Judge (IJ) found that each member of the McAllister family was removable. The IJ denied all of Malachy's requested relief but granted asylum to Sarah and the children. Malachy filed a timely appeal. The Office of Immigration Litigation (OIL)[2] appealed the IJ decision concerning Sarah and the children. On November 17, 2003, the BIA issued two final orders of removal. In the first order, the BIA affirmed the IJ's determination that Malachy was removable on the grounds that he had engaged in terrorist activities. *See* 8 U.S.C. § 1227(a)(4)(B).

---

[2] On March 1, 2003, the INS was eliminated as an agency under the Department of Justice. The functions for which INS was responsible were transferred to the Department of Homeland Security and, as regards the proceedings in this case, to OIL. *See* Homeland Security Act of 2002, Pub. L. No. 107- 296, 116 Stat. 2135 (2002).

The BIA also affirmed the IJ's denial to him of relief from removal. In the second order, the BIA affirmed the IJ's determination that Sarah and the children were removable for overstaying their visas. The BIA, however, reversed the IJ's grant of asylum to Sarah and the children and denied all their other requests for relief, except for voluntary departure. The McAllisters appealed and their appeals were consolidated.

On May 10, 2004, Sarah died of cancer. On July 1, 2004, Nicola and Sean filed a Motion to Reopen the November 17, 2003, Order of the BIA so that they could independently file applications for asylum and for relief under CAT. On August 3, 2004, the BIA denied their motion because it was not timely filed.[3] *See* 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(2). On September 16, 2004, Nicola and Sean filed a petition for review of the BIA's decision.

III. Jurisdiction

A. Malachy

We have jurisdiction to review final orders of removal. *See* 8 U.S.C. § 1252(a)(1). There are, however, certain situations in which our jurisdiction to review final orders of removal is limited or eliminated. *See* 8 U.S.C. § *1252(a)(2)(A)-(C),* 1158(b)(2)(D). If the issues presented in a petition for review of a final order involve constitutional claims or questions of law, our jurisdiction is never limited or eliminated. *See* 8 U.S.C. § 1252(a)(2)(D).[4] On the other hand, if an alien is removable for having committed one of the offenses enumerated in 8 U.S.C. § 1252(a)(2)(C),[5] we lack jurisdiction to review a final order of removal that does not raise constitutional claims or questions of law. *See* 8 U.S.C. § 1 252(a)(2)(C)-(D).

---

[3] The BIA's decision also found that Nicola and Sean's motion did not meet any of the exceptions to the timeliness requirement. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003 .2(c)(3)(ii).

In the present case, the BIA did not specifically find that Malachy was removable for having committed one of the offenses enumerated in subsection (C). Rather, the BIA found Malachy removable based on his engagement in terrorist activities. *See* 8 U.S.C. § 1227(a)(4)(B).[6] Thus, whether subsection (C) limits our jurisdiction depends on whether the jurisdictional bar of subsection (C) requires the final order of removal to be based on one of subsection (C)'s enumerated offenses. We address this issue as one of first impression for our Court.

---

[4] On May 11, 2005, the President signed into law the REAL ID Act of *2005,* Pub. L. No. 109-13, 119 Stat. 231 *(2005).* The REAL ID Act amended the INA and provided that the courts of appeals shall have jurisdiction to review all final orders of removal that raise constitutional claims and questions of law.

[5] 8 U.S.C. 1252(a)(2)(C) **Orders against criminal aliens**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States code [28 uscs § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28USCS § 1361 and 1651], and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (c), or (D) [crimes of moral turpitude, violation of laws relating to controlled substances, conviction of 2 or more offenses with aggregate sentences of confinement of 5 years of more, involvement in drug trafficking, involvement in prostitution and other unlawful commercialized vice, immunization from prosecution for a crime committed in the U.S., severe violations of religious freedom by foreign government officials, significant trafficking in persons, money laundering, and other enumerated offenses.], or any offense covered by section 237(a)(2)(A)(ii) [multiple criminal convictions] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 23 7(a)(2)(A)(i) [moral turpitude].

Our sister circuits have addressed the application of the jurisdictional bar of subsection (C), and of similar jurisdictional provisions, *e.g.*, § 440(a) of the Antiterrorism and Effective Death PenaltyAct of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and § 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), *amended* by the Act of Oct. 11, 1996, Pub. L. No. 104-302, 110 Stat. *3656* (1996). Some courts have held that the final order of removal does not need to be grounded in one of the enumerated offenses for the jurisdictional bar to apply. *See Fernandez-Bernal v. Attorney General, 257* F.3d 1304, 1310 (11th Cir. 2001) (holding that jurisdictional bar of subsection (C) is not dependent upon the grounds of removal being based on one of the enumerated offenses); *Lopez-Elias v. Reno,* 209 F.3d 788, 793 (5th Cir. 2000) (same); *Abdel-Razekv. INS,* 114 F.3d 831, 832 (9thCir. 1997) (holding that jurisdictional bar of AEDPA § 440(a) is not dependent upon the final order of removal referring to one of the provision's enumerated offenses) Other courts, however, have required the final order of removal to be based on one of the enumerated offenses. *See Yousefi v. INS,* 260 F.3d 318, *325* (4th Cir. 2001) (requiring a deportation order to be based on an offense enumerated in § 309(c)(4)(G) for that provision's jurisdictional bar to apply); *Xiong v. INS,* 173 F.3d 601, 608 (7th Cir. 1999) (prohibiting the INS from arguing that the alien committed an enumerated offense on appeal in support of a jurisdictional bar because the final order of removal was based on an unenumerated offense); *Choeum v. INS,* 129 F.3d 29, 39 (1st Cir. 1997) (finding it doubtful that Congress intended "deportable for reason of" in AEDPA § 440(a) to be the equivalent of "potentially susceptible to being deported by reason of").

---

[6] 8 U.S.C. § 1227(a)(4)(B) **Terrorist activities**

Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) [8 USCS §1182(a)(3)] is deportable.

We conclude that Congress intended that the clear language of the statute be utilized. Thus, we read the jurisdictional bar of subsection (C) to apply when the *actual basis* for the final order of removal was the alien's commission of one of the enumerated offenses. *See Yousefi,* 260 F.3d at 325. *See also Xiong,* 173 F.3dat608; *Choeum,* 129F.3dat39. We are convinced that the approach taken by the First, Fourth and Seventh Circuits with regard to the jurisdictional bar for review of final orders of removal is the proper approach. We hold that for purposes of the jurisdictional bar found in 8 U.S.C. § 1252(a)(2)(C), an alien is not "removable for reason of having committed [an enumerated] criminal offense" *unless* the final order of removal is grounded, at least in part, on one of those enumerated offenses.

In this case, the BIA found Malachy removable because he engaged in terrorist activities, which is not an offense enumerated in subsection (C). Therefore, subsection (C) does not limit our jurisdiction to review the BIA's final order of removal, and we will give full review to his petition.

B. Sarah

When a case or controversy ceases to exist between two parties, the case is rendered moot. *See* U.S. CONST. art. III, § 2; *Spencer v. Kemna, 523* U.S. 1 (1998). When an alien dies with her case pending before the court of appeals, the court of appeals can no longer grant the relief that the alien seeks. The case or controversy ceases to exist, rendering the alien's claim moot. In this case, Sarah died on May 10, 2004, while her case was pending before us. Her death rendered her claims moot and we will dismiss her petition. *See Spencer v. Kemna, 523* U.S. 1, 18 (1998).

C. Nicola and Sean

Nicola and Sean were derivative applicants on Sarah's applications for relief from removal. As derivative applicants, they relied on Sarah's application for relief. *See* 8 U.S.C. § 1153(d). When Sarah's claim became moot, Nicola and Sean were left without the principal alien upon whose application their own status rested. On July 1, 2004, Nicola and Sean filed a motion to reopen their case in order to file independent applications for relief based on the events that were the subject of Sarah's original application as well as on an assertion that a cousin in Northern Ireland had been attacked and beaten by a gang of Loyalists. On August 3, 2004, the BIA denied the motion to reopen on the basis that it was filed more than 90 days after the November 17, 2003, order of the BIA, denying them asylum. The BIA further held that the motion to reopen did not fall within any of the exceptions to the timely filing of motions to reopen because Nicola and Sean had not demonstrated *prima facie* eligibility for asylum. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii).

On September 16, 2004, Nicola and Sean filed a petition for review of the BIA's denial. Because the petition for review was filed more than thirty days after the BIA's August 4, 2004, final order, the petition was untimely. Thus, we lack jurisdiction to review this decision by the BIA, and we will dismiss Nicola and Sean's appeals. *See* 8 U.S.C. § 1252(b)(1). *See also Navarro-Miranda v. Ashcroft,* 330 F.3d 672, 676 (5th Cir. 2003) (applying the thirty-day deadline of § 1 252(b)(1) to a petition for review of a motion to reopen).

D. Paul Gary

On March 17, 2004, the BIA remanded Paul Gary's case to the Immigration Court so that he could apply for adjustment of status. Pursuant to 8 U.S.C. § 1252(d)(1), we no longer have jurisdiction to review his claims. Therefore, we will dismiss Paul Gary's claim for lack of jurisdiction.

IV. Standard of Review.

We now turn to the substance of Malachy's petition. We review the BIA's findings of fact to determine whether substantial evidence supports them. *See Singh-Kaur v. Ashcroft,* 385 F.3d 293, 296 (3d Cir. 2004). We will only reverse the BIA's findings "if the evidence compels a contrary conclusion." *Ahmed v. Ashcroft,* 341 F.3d 214, 216 (3d Cir. 2003) (citing INS *v. Elias-Zacarias,* 502 U.S. 478, 481 n.1 (1992)). We give *de novo* review to constitutional claims. *See Chong v. District Director, INS,* 264 F.3d 378, 386 (3d Cir. 2001). We review the BIA's interpretation of the INA to determine whether it is "arbitrary, capricious or manifestly contrary to the statute." *See Ahmed,* 341 F.3d at 217 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def Council, Inc.,* 467 U.S. 837, 844 (1984)). With respect to the denial of a motion to reopen,[7] we apply the abuse of discretion standard. *See Borges v. Gonzalez,* 402 F.3d 398, 404 (3d Cir. 2005). The BIA's denial of a motion to reopen will not be disturbed unless it is "arbitrary, irrational, or contrary to law." *Guo v. Ashcroft,* 386 F.3d *556, 562* (3d Cir. 2004) (quoting *Tipu v. INS,* 20 F.3d 580, 582 (3d Cir. 1994)).

---

[7] For purposes of jurisdiction and standard of review, motions to remand and motions to reopen are treated the same. *See Korytnyuk v. Ashcroft,* 396 F.3d 272, 282 & n.15 (3d Cir. 2005).

V. Analysis

A. Removal

Malachy challenges the BIA's determination that he is removable, claiming that he did not engage in "terrorist activities." Malachy asserts four grounds to support his contentions of error. First, he argues that the INA's definition of "terrorist activity" is unconstitutionally overbroad because it encompasses common crimes that no reasonable person would consider to be terrorist acts. Second, he claims that the BIA failed to find that he was a member of a terrorist organization. Third, he asserts that he did not target non-combatants. Finally, he contends that the situation in Northern Ireland had risen to the level of an Article 3 conflict under the Geneva Convention so that his conduct could not be considered a terrorist activity. In the alternative, Malachy claims that the INA's "political offense" exception applies in this case, and therefore the BIA's determination that he was removable is erroneous.

1. Engaging in Terrorist Activity

a. "Terrorist Activity"

Malachy asserts that the definition of "terrorist activity" in 8 U.S.C. § 1 182(a)(3)(B)(iii)(V)(b) is unconstitutionally overbroad. We note that Malachy's argument also raises issues of vagueness, which is similar to the doctrine of overbreadth. *Waterman v. Farmer,* 183 F.3d 208, 212 n.4 (3d Cir. 1999). As such, we will examine both doctrines.

A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926)). A statute is unconstitutionally overbroad if it "does not aim specifically at the evils within the allowable area of control [by the government] but . . . sweeps within its ambit other [constitutionally protected] activities." *Id.* at 212 *n.5* (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940)). Clause (iii) of 8 U.S.C. § 11 82(a)(3)(B) states, in relevant part, that "terrorist activity" is:

> any activity which is unlawful.. which involves . . . [using an] explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). While this definition is certainly broad, we conclude that it is neither vague nor overbroad in that it does not infringe on constitutionally protected behavior. The definition includes a great deal of conduct, but all of this conduct could reasonably constitute terrorist activities.

First, the parenthetical phrase "other than for mere personal monetary gain" removes common crimes from the definition by requiring that the offending activity be conducted for reasons other than money. For that reason, offenses like robbery and burglary are not included in the definition. Second, the *mens rea* element of the provision requires the actor to have the specific intent to endanger the safety of individuals or to cause substantial damage to property. Thus, the definition of terrorist activity does not include situations in which an alien has acted in self-defense[8] or in which the alien lacks the capacity[9] to meet the requisite intent. More importantly, none of the aforementioned activities constitute a protected activity outside of the permissible bounds of Congressional regulation.

In support of his position, Malachy provided three hypothetical examples of conduct that he claims would unconstitutionally fall under the statutory definition of "terrorist activity." The examples are "an 8-year-old child who brings a baseball bat to school to protect himself from bullies; an individual institutionalized for a mental health disorder who attacks a doctor; [and] a woman who protects herself, in the course of a domestic violence attack, with standard kitchen cooking utensils." Our examination of the conduct involved in these three hypotheticals convinces us, however, that none of them would constitute "terrorist activity" under the definition because none of them satisfies the elements of the definition nor are the characters engaging in protected activity. For example, both the little boy and the battered wife have acted in self defense, which negates the "unlawful" element. The institutionalized individual *in all likelihood* does not have the legal capacity to satisfy the intent requirement under the common law. *See* 1 LAFAVE *supra* § 7.1. Although we concede that the INA's definition of "terrorist activity" certainly encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism, *e.g.*, car bombs and assassinations, nevertheless, we conclude that the INA's definition of "terrorist activity" found in 8 U.S.C. §

---

[8] See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(a) (2d ed. 2003 & Supp. 2005).

[9] *See* 1 LAFAVE *supra* § 7.1.

1182(a)(3)(B)(iii)(V)(b), is neither unconstitutionally overbroad nor vague.

b. Member of a "Terrorist Organization"

Malachy next contends that the BIA erred when it found that he had engaged in terrorist activities because the BIA did not at the same time find that he was a member of a terrorist organization. To be engaged in a terrorist activity, the INA requires an alien to act either "in an individual capacity or as a member of *an* organization." 8 U.S.C. § 1182(a)(3)(B)(iv) (emphasis added). The statute does not qualify the term "organization." Terms and provisions may not be added to a statute where Congress has omitted them. *See Sale v. Haitian Centers Council, Inc., 509* U.S. 155, 168 n.16 (1993). Therefore, the BIA must find that an alien acted on his own or as a member of an organization - not just a terrorist organization - before it determines that the alien engaged in "terrorist activity."

In this case, it is undisputed that Malachy acted as a member of the Irish National Liberation Army (INLA) and not as an individual. The INLA is not a terrorist organization as the INA defines that term. *See* 8 U.S.C. § 1182(a)(3)(B)(vi). Because the INA does not expressly require the organization, with which the alien was acting, to be a *terrorist* organization, we accept as reasonable the BIA's construction of 8 U.S.C. §1182(a)(3)(B)(iv): an alien must be acting either individually or as a member of *an* organization - but not necessarily as a member of a *terrorist* organization.[10]

---

[10] We also note that even if 8 U.S.C. § 11 82(a)(3)(B)(iv) were not clear on its face, for us to interpret the provision to mean that the offending conduct must have been committed in one's individual capacity or as a member of a *terrorist* organization would leave a gaping hole in the statute that Congress could not have intended. The result of such an interpretation would be that conduct identical to that which the statute

c. Targeting Non-combatants and Article 3 Conflict

Malachy claims that the BIA erred in finding that he engaged in terrorist activities because, at the time he engaged in the conduct, he did not target non-combatants and the situation in Northern Ireland had risen to the level of an Article 3 conflict under the Geneva Convention. The issue we must now consider is whether the BIA must weigh such factors in making the determination that an alien has engaged in terrorist activities.

The BIA did not consider whether Malachy had targeted non-combatants and did not consider whether the situation in Northern Ireland had risen to the level of a Geneva Convention Article 3 conflict. The INA's definition of engaging in terrorist activity does not address either the targeting of non-combatants or the levels of conflict under the Geneva Convention. Consequently, Malachy' s proffered distinctions between combatant and non-combatant and Article 3 verses non-Article 3 conflict are not sustainable, and the BIA did not err." [11]

---

calls "engaging in terrorist activity" would not be such if the alien chose to act as a member of an organization that the INA does not define as a "terrorist organization." To interpret the statute in this manner would be unreasonable.

[11] Even if the INA were ambiguous on this point, we are reluctant to find that the BIA's interpretation of "terrorist activity" is unreasonable or that it was necessary to include these factors in its analysis. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Abdulai v. Ashcroft*, 239 F.3d 542, 552 (3d Cir. 2001) (quoting *Chevron*).

2. "Political Offense" Exception

In the alternative, Malachy claims that, even if he has engaged in terrorist activities, the BIA erred when it found him removable because the "political offense" exception to the INA applies to his conduct. "Political offenses" is a "designation of a class of crimes usually excepted from extradition treaties, this term denotes crimes which are incidental to and form a part of political disturbances." Black's Law Dictionary 1158 (6th ed. 1990). The "political offense" exception appears three times in the text of the INA. *See* 8 U.S.C. § 1101(a)(43)(F), 11 82(a)(2)(A)(i)(I), and 11 82(a)(2)(B). None of the provisions that contain the "political offense" exception applies in this case. Section 110 1(a)(43) defines the term "aggravated felony." Section 11 82(a)(2)(A)(i)(I) deals with aliens who have been convicted of a crime involving moral turpitude. Section 1182(a)(2)(B) deals with aliens who have committed two or more offenses with an aggregate time of incarceration that is five years or more. In this case, the BIA found Malachy removable because he engaged in terrorist activities. None of the provisions containing the term "political offense" pertain to or refer to provisions involving terrorist activities. The BIA determined that the "political offense" exception was a limited exception that applied only to the specific subsections in which it was found and thus did not apply to terrorist activities. We conclude that this interpretation of the "political offense" exception was reasonable. *See Chevron,* 467 U.S. at 843; *Abdulai,* 239 F.3d at 552.

B. Asylum

In addition to challenging his removal order, Malachy contends that the BIA erred when it found that he was ineligible for asylum. He asserts that to be found ineligible for asylum, the BIA must find that he has engaged in terrorist activities *and* that he is a danger to the security of the United States. He claims that the BIA found only the former. Whether the INA requires the BIA to make both findings is a question of law.

According to Malachy, "[t]he statute imposes a two-part analysis: (1) whether an alien engaged in a terrorist activity and (2) whether there are reasonable grounds to believe that the alien is a danger to the security of the United States." *Cheema v. INS, 350* F.3d 1035, 1041 (9th Cir. 2003), *superceded on other grounds by* 383 F.3d 848 (9th Cir. 2004). We disagree with Malachy for two reasons. First, under the clear language of the statute, an alien is not eligible for asylum if the Attorney General determines "there are reasonable grounds for regarding the alien as a danger to the security of the United States," *or* that "the alien is described in . . . section 1227(a)(4)(B) of [Title 8] (relating to terrorist activity)." 8 U.S.C. § 1 158(b)(2)(A)(iv)-(v). In this case, the BIA affirmed the IJ's determination that Malachy was removable under 8 U.S.C. § 1227(a)(4)(B). For that reason, under the express language of the statute, Malachy was not eligible for asylum.

Second, Malachy inappropriately relies on *Cheema*. The Ninth Circuit limited the *Cheema* ruling to cases in which the application for asylum was filed prior to April 1, 1997, because the *Cheema* decision was based on a version of the asylum statute that preceded IIRIRA. IIRIRA eliminated the application of the *Cheema* two-part analysis on all asylum applications filed after April 1, 1997. In this case, Malachy filed his application for asylum after March 5, 1999. Therefore, the *Cheema* two part analysis does not apply.

Under the applicable version of the INA, an alien is ineligible for asylum if the Attorney General determines that the alien has engaged in terrorist activities. *See* 8 U.S.C. § 1

158(b)(2)(A)(v). The BIA properly interpreted the statute in determining that Malachy was not eligible for asylum because he had engaged in terrorist activities. Thus, we will affirm the BIA's determination that Malachy is not eligible for asylum.

C. Withholding of Removal

Malachy also claims that the BIA erred when it determined that he was not eligible for withholding of removal under the INA. He claims that the BIA should have done more than rely on its determination that he engaged in terrorist activities. Under the INA, an alien is ineligible for withholding of removal when the Attorney General decides that the alien is a danger to the security of the United States. *See* 8 U.S.C. § 123 1(b)(3)(B)(iv). The statute specifically provides that, where the Attorney General has determined that an alien has engaged in terrorist activities, "there are reasonable grounds for regarding [that alien] as a danger to the security of the United States." 8 U.S.C. § 1231 (b)(3)(B). Therefore, under the express language of the statute, Malachy was ineligible for withholding of removal. The BIA's determination to this effect cannot be considered unreasonable. Thus, we will affirm the BIA's determination that Malachy is ineligible for withholding of removal under the INA.

D. Deferral of Removal

Malachy contends that the BIA erred when it found that he had failed to establish a *prima facie* case for deferral of removal. To establish a *prima facie* case for deferral, an alien must establish that it is more likely than not that he will be tortured in the country of removal. *See* 8 C.F.R. § 208.16(c)(2). In its assessment of whether an alien will likely be tortured in the country of removal, the BIA must consider "all evidence relevant to the possibility of future torture, including "information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3). In this case, the BIA relied heavily on the Department of State's *Country Report on Human Rights and Practices,* as it pertained to the conditions in Northern Ireland and the United Kingdom. Based on the Country Report, the BIA found that Catholic nationalists, conservatives, and IRA supporters and former IRA members (even those who were convicted and sentenced for terrorist offenses) were able to "freely go about their lives," "hold prominent positions in business, government, education and other walks of life," and "participate openly in the political process and [] hold public office." The Country Report has been called the "most appropriate and perhaps the best resource' for 'information on political situations in foreign nations." *Kazlauskas v. INS, 46* F.3d 902, 906 (9th Cir. 1995) (quoting *Rojas v. INS,* 937 F.2d 186, 190 n.1 (5th Cir. 1991)). Thus, there was ample basis for the BIA's determination that the United Kingdom was not a place where members of Malachy's race, religion, or political affiliations were being tortured.

The BIA also pointed to other evidence that demonstrated progress towards peace in Northern Ireland, including the devolution of power from the British Parliament to the Northern Ireland Assembly, a reduction in the deployment of British military troops in Northern Ireland, and evidence that paramilitary organizations are abiding by the cease-fire, pursuant to the Good Friday Agreement.[12] The

---

[12] The Good Friday Agreement was an agreement between the major political parties of Northern Ireland, setting forth new constitutional arrangements for Northern Ireland. The agreement was entered on April 10, 1998, and provided that whether Northern Ireland would remain part of the United Kingdom would be decided by a majority of Northern Ireland voters. Seventy-one percent of Northern Ireland voters approved the agreement.

BIA found that Malachy had failed to establish that either the government of Northern Ireland or the government of the United Kingdom would torture him. The BIA held that the record does not support the finding that Malachy would more likely than not be detained and, if detained, that he would more likely than not be tortured and, if tortured, that it would more likely than not be with the acquiescence of the government to such torture.

The only new evidence that Malachy presents in support of his argument that he is more likely than not to be tortured in Northern Ireland, is the District Court opinion regarding his son, Mark. *See McAllister v. Ashcroft*, No. 04-0181 (D.N.J. July 21, 2004). Our review, however, is limited to the administrative record of this case. *See* 8 U.S.C. § 1252(b)(4)(A). The District Court opinion that Malachy asks us to consider is not part of the administrative record here and is therefore beyond the scope of our review. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 *(1985)*. Based on the evidence *in* the administrative record and because Malachy has failed to introduce any new evidence that we may consider, we are not compelled to come to a conclusion that is contrary to that of the BIA. We will affirm the BIA's holding that Malachy failed to establish a *prima facie* case for deferral of removal.[13]

E. Motion to Remand

---

[13] We also note that Malachy's claim is that he will be tortured if he is returned to *Northern Ireland*. Malachy, however, is being removed to the United Kingdom. As the federal regulations make clear, "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured" must be considered. We see no reason why Malachy and his family may choose not to return to Northern Ireland but to go instead to some other part of the United Kingdom.

Finally, Malachy asserts that the BIA erred when it denied his Motion to Remand for a new hearing on his request for deferral of removal. He argues that he is able to present new evidence that challenges the evidence on which the BIA relied. In this case, the BIA determined that Malachy had failed to establish *aprimafacie* case for deferral of removal. The BIA recognized that Malachy presented new evidence but held that the evidence was insufficient to overcome the BIA's conclusion concerning conditions in Northern Ireland. The BIA stated that a showing of past collusion between the British government and loyalist forces in Northern Ireland does not demonstrate that such collusion still exists or that there is an on-going threat to Malachy's safety. The BIA's reasoning in this regard is neither arbitrary or capricious. We, therefore, hold that the BIA did not abuse its discretion when it denied Malachy's motion.

VI. Conclusion

For the reasons stated above, we will deny Malachy McAllister's petition to review the BIA's determination that Malachy is removable for having engaged in terrorist activities and to review BIA's denial of asylum, withholding of removal, deferral of removal, and remand.

We will dismiss the petitions for review of Sarah, Paul Gary, Nicola, and Sean McAllister for lack of jurisdiction.

Barry, Circuit Judge, concurring

I refuse to believe that "Give me your tired, your poor, your huddled masses yearning to breathe free..." is now an empty entreaty. But if it is, shame on us.

I concede. I cannot find a way to keep the McAllisters in this country, and I have surely tried. But the laws Congress has enacted, particularly those enacted in the wake of the September 11th horror, are bullet-proof, designed, as they should be, to combat terrorism. The problem here, though, is that Congress's definition of "terrorist activity" sweeps in not only the big guy, but also the little guy who poses no risk to anyone. It sweeps in Malachy McAllister.

Malachy's children, Sean and Nicola, are swept in, too, albeit in a very different way, as victims of the "gotcha" defense they presented too little, too late, after their mother, Sarah, died of cancer a mere six weeks after diagnosis and her successful asylum application, on which they had been dependent, became moot. The Immigration Judge had granted asylum to Sarah and her children in a sixty-five page opinion issued after twelve trial days during which he heard sixteen witnesses, one of the most impressive opinions I have read in my years on the federal bench. He found such "overwhelming evidence of severe past persecution" suffered by Sarah because of her religion, her political opinion, and because she was Malachy's wife, that, without more, she and her children should not be forced to go back to the United Kingdom.

But, in a mere four pages, the Board of Immigration Appeals threw out that grant of asylum, concluding with utterly no discussion that no event or combination of events rose to the level of past persecution and that, regardless, there was little chance of future persecution in the United Kingdom. I simply cannot understand how the Board can have given such short shrift to the Immigration Judge's extensive compilation and discussion of the innumerable acts of persecution, including "the most striking and blatant act" that occurred on a Sunday evening in 1985 when twelve-year-old Paul, two-year-old Nicola, and one-year-old Sean survived twenty-six shots fired into their home by masked gunmen "intending to kill the entire family." Nevertheless, because the children had to file individual applications upon their mother's death, applications that were denied and then appealed to us two weeks too late, we have no power to stop their return to a country they left when they were little more than babies. Gotcha.

Malachy, a Nationalist Catholic, concededly committed two criminal acts in Belfast twenty-five years ago, and so he has been branded guilty of "terrorist activity." Those were terrible days which saw, among other horrors, rioting, the burning of vehicles, the demolition of buildings, and the harassment of Catholic children playing and walking to school. It was a time of violent political conflict. But that was then. No one now suggests that Malachy poses a threat to anyone, much less to our national security, but this is a fact that Congress does not permit us to consider.

Additionally, I cannot help but observe that Malachy's acts, and the ensuing conviction on which the findings of removability and ineligibility for asylum or any other relief was based, bear no relation to any common-sense understanding of what "terrorist activity" really is or should be. Because, however, Congress has defined "terrorist activity" and "engage in terrorist activity" so broadly, it is game, set, and match. Lest anyone question how broad those definitions are, I offer this: to assist a suicide by knowingly providing the weapon used would be to "engage in terrorist activity," as would swinging a baseball bat at someone during a bar-room brawl, as would teenage gang members planning to go after a rival gang and use their knives if necessary.

Worse yet, we are prohibited from considering not only the man Malachy is today, but the circumstances surrounding his commission of those acts twenty-five years ago invoked now to deny him relief — the eight hundred years of history that led Malachy to fight with his people to remove British rule, and the persecution inflicted by that rule on Northern Ireland and on Malachy and his family. "The Troubles," the Immigration Judge found, touched each of the McAllisters' lives. In what ways, and how deeply? Again, we cannot inquire.

It simply should not be that, particularly in circumstances such as those we now have before us, the individual and his individuality are largely, if not entirely, irrelevant, lost in a sea of dispositive definitions and harsh and complex laws. And we cannot be the country we should be if, because of the tragic events of September 11th, we knee-jerk remove decent men and women merely because they may have erred at one point in their lives. We should look a little closer; we should care a little more. I would ask - no, I would implore - the Attorney General to exercise his discretion and permit this deserving family to stay.

U.S. Department of Justice Decision
of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A73 551 834 – Newark
Date: AUG 3 2004
A73 551 835

In re: NICOLA McALLISTER
SEAN R.McALLISTER (1)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Eamonn Dornan, Esquire.

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled (all respondents)

Lodged: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227.(a)(1)(B)] -
In the United States in violation of law (all respondents)

APPLICATION: Reopening

The respondents are a sister and brother, both natives and citizens of the United Kingdom. specifically Northern Ireland, who entered the United Stales on or about March 6, 1996. Each of respondents' parents filed a separate affirmative application for asylum and withholding of removal under sections 208 and 241(b)(3) of the immigration and Nationality Act, 8 U.S.C. § 1158 and 123 l(b)(3), and for protection under the Convention Against Torture. Along with their two older brothers, the respondents were listed as derivative beneficiaries on their mother's asylum application.

The respondents were placed in removal proceedings upon the filing of a Notice to Appear (Form 1-862) with the Immigration Court. (2)

---

(1) The Notices of Appearance as Attorney before the Board (Form EOIR-27) filed by counsel for each of the two respondents listed in the heading contains four alien registration numbers, two of which relate to these two respondents. The other two alien registration numbers belong to the respondents' parents, neither of whom is included in the present motion. Due to this, filing receipts for a motion to reopen were erroneously sent to each of the respondents' parents. Only the two respondents named in the caption of this order are included in the motion to reopen. We note that the proper practice when completing an EOIR-27 is to list only the alien registration number(s) for the alien(s) whose name(s) is shown as the client for whom the attorney is filing an appearance in order to avoid confusion as to which aliens are appealing a decision or moving the Board for reopening or reconsideration.

(2) The respondents were placed in proceedings along with their father, Malachy McAllister, A73-629-577, their mother, Sarah B. McAllister, A73-55 1-831, and their two older brothers, Paul Gary McAllister, A73-55 1-832, and Mark James McAllister, A73-55 1-833. The female respondent is presently almost 18 years of age and the male respondent is approaching 17 years of age.

In a written decision dated October 1, 2000, an immigration Judge granted the respondents' mother asylum. As derivatives on her application, the respondents were also granted asylum. The then Immigration and Naturalization Service (INS), now abolished and its immigration functions transferred to the Department of Homeland Security (DHS), filed an appeal of the Immigration Judge's decision granting asylum to the respondents' mother. The respondents' brother Mark and father each filed an appeal of the Immigration Judge's decisions in each of their cases In a decision dated November 17, 2003, we sustained the DHS's appeal, ordered the respondents' mother, the respondents, and the respondents' brother Paul removed, and granted them the privilege of voluntary departure. In separate decisions of the same date, we dismissed the appeals of the respondents' father and brother Mark. All members of the family filed a petition for review with the United States Court of Appeals for the Third Circuit (Docket# 03-4513), which remains pending.

---

(3) The respondents' older brother Paul was also granted asylum by the Immigration Judge as a derivative beneficiary of their mother's application. The respondents' other brother, Mark, was denied asylum and withholding of removal and protection under the Convention Against Torture in a separate decision rendered March 28, 2002. The respondents' father was denied asylum and withholding of removal and protection under the Convention Against Torture in the Immigration Judge's October 11, 2000, decision.

On July 1, 2004, the respondents filed a motion to reopen. (4) In their motion, the respondents seek to independently apply for asylum and for protection under the Convention Against Torture because their mother recently passed away which leaves them without the principal alien upon whose application their own status rested.(5) The respondents seek to apply for asylum primarily based upon the events that were the subject of their mother's original application as well as upon their assertion that a cousin in Belfast, Northern Ireland, was recently attacked and beaten by a gang of Loyalists. The DHS has filed a response in opposition to the motion.

The respondents' motion to reopen is untimely because it was not file within 90 days of our November 17, 2003, decision. *See* 8 C.F.R. § 1003.2(c)(1) Nor does their motion fall within any of the enumerated exceptions to the timelines requirement. *See* 8 C.F.R. 1003.2(c)(3). The respondents have not met the requirements for motions to reopen to apply for asylum because they have not established changed circumstances arising in their native country. *See* 8 C.F.R. § 1003.2(c)(3)(ii).

---

(4) The respondents' brother Paul is not included in this motion because his case was remanded to the Immigration Judge by the Board in a decision dated March 17, 2004, in order to allow him to apply for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

(5) With their motion, the respondents submitted their mother's death certificate which reflects her unfortunate passing on May 10, 2004. *See* Resp. Mot. at tab F.

Their single reference in their motion to a cousin who was recently attacked and beaten by Loyalists lacks detail and is unsupported by any documentary evidence, such as an affidavit from the cousin, a police report, or medical report, which would provide the needed detail. The one generalized reference is insufficient to meet their burden of demonstrating that changed circumstances arising in their native country exist sufficient to warrant the reopening of proceedings. The primary thrust of the respondents' fear of return lies in the events underpinning their mother's asylum claim which events do not constitute changed circumstances arising in their native country.

As the respondents' motion does not fall within any of the enumerated exceptions to the timely filing of motions to reopen, the reopening of proceedings, if granted, must be done upon the exercise of the Board's own authority. *See Mailer of J-J-*, 21 1&N Dec. 976 (BIA 1997) (the Board's power to reopen cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations). We therefore look to the merits of the respondents' case to see whether they have demonstrated prima facie eligibility for asylum which, due to the passing of their mother, would support our exercise of this authority.

The DHS states that the respondents have established that exceptional circumstances exist which prevents the application of the statutory bar to persons who apply for asylum more than 1 year after their arrival in the United States. We agree that the respondents are not prohibited by section 208(a)(2)(B) of the Act from applying for asylum. *See* section 208(a)(2)(D) of the Act; 8 C.F.R. § 1208.4(a)(4)(i)(C). The DHS argues, however, that notwithstanding that they are not statutorily barred by section 208(a)(2)(B) of the Act from applying for asylum, the respondents have not established prima facie eligibility &

asylum because the Board denied their mother's application for such relief after finding that conditions had changed in Northern Ireland and the United Kingdom. We agree. The Immigaiion Judge did not find that these respondents suffered past persecution. The issue therefore becomes whether the respondents have provided prima facie evidence regarding a well-founded fear of persecution. The respondents cite to an attack upon their cousin at some unknown "recent" point in time. As discussed above, this allegation in their motion is unsupported by documentary evidence detailing the circumstances of this attack and whether any police action was taken. Thus, not only does this allegation not constitute evidence that country conditions have changed but also this allegation does not support a finding that these respondents face a well-founded fear of persecution. In addition, we note that the respondents were 2 1/2 years and 1 year of age when the family left Northern Ireland in December 1988 and have not lived in that country for over 15 ½ years. In particular, they have not presented evidence showing that in 2004 they have a well-founded fear of persecution based upon events which befell the family over a decade and a half ago. Likewise, they have failed to provide evidence demonstrating that current country conditions in Northern Ireland support a finding that they have a well-founded fear of persecution on account of any of the five asylum grounds. Moreover, the respondents have not shown that they cannot live safely in the United Kingdom outside of Northern Ireland. Furthermore, it is possible that they may be able to live in the Republic of Ireland or elsewhere within the European Union. Regardless, they have failed to establish prima facie eligibility for asylum which would warrant the reopening of proceedings upon our own authority.

Accordingly, the motion to reopen is denied.

/s/ Edward R. Grant

FOR THE BOARD

U.S. Department of Justice Decision
of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A73 551 831 – Newark
Date: Nov 17 2003
A73 551 832

A73 551
834

A73 551 835

In re: SARAH B. McALLISTER(1)
PAUL GARY McALLISTER
NICOLA McALLISTER
SEAN R.McALLISTER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

Eamonn Dornan, Esq.

ON BEHALF OF DHS:

Kathleen Hogan Assistant
District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -

Present without being admitted or paroled (all respondents)

Lodged: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227.(a)(1)(B)] -

In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The Department of Homeland Security ("DHS," formerly the Immigration and Naturalization Service) appeals from an October 11, 2000, Immigration Judge's decision granting the respondents' applications for asylum under section 208 of the Immigration and Nationality Act (the "Act"), 8 U.S .C. § 1158. The appeal will be sustained.

We find that the respondents have not met their burden of establishing that they suffered past persecution or have a well-founded fear of future persecution on account of religion, political opinion, or other statutory ground. *See Matter of Y-B-*, 21 I&N Dec. 1136 (BIA *1998); Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

---

(1) Separate decisions are being issued in the cases of Sarah McAllister's husband, Malachy, and son, Mark.

None of the events described by the respondents, as recounted by the Immigration Judge (I.J. at *45-55)*, rises to the level of past persecution. "'Persecution' within the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional" *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997). Nor do the respondents' experiences, in the aggregate, rise to the level of persecution. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998).

Additionally, even if the respondents had suffered persecution on account of a protected ground, we agree with the Immigration Judge's conclusion that country conditions have changed to such a degree that there is little chance of future persecution in the United Kingdom (I.J. at *56). See* 8 C.F.R. § 1208.13(b)(1)(i)(A). In a letter assessing the asylum application of the respondent, the Bureau of Democracy, Human Rights and Labor of the United States Department of State reports:

> Although sectarian violence continues to affect members of both [Catholic and Protestant] communities, Catholic nationalist[s] freely go about their lives in Northern Ireland. Catholic nationalists of all opinions hold prominent positions in business, government, education and other walks of life. Sinn Fein, the political wing of the IRA, is a legal political party whose officials openly campaign and hold office...The same holds true for former IRA supporters and members who have previously been convicted and have served prison terms for criminal and/or terrorist offenses. Many of these individuals participate openly in the political process and

> some hold public office in Northern Ireland. Although British courts have reversed a few past criminal and/or terrorist convictions due to irregular police practices, there is no reason to believe such practices continue or that British authorities extra-legally target or persecute anyone in Northern Ireland.

(Exh.44). "[W]e note that country condition profiles developed by the State Department have been found to be 'the most appropriate and perhaps the best resource' for information on conditions in foreign nations." *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) *(quoting Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995)).

Moreover, in 2000 the State Department reported that "[i]n support of the Good Friday Agreement (2), the Government continued during the year to release prisoners affiliated with paramilitary organizations that maintain a cease-fire"(Exh.77-2 2). (3) Further progress in Northern Ireland is evident in the form of; the devolution of power from Parliament to the new elected Assembly, whose Executive included representatives from both unionist and nationalist parties (Exh.77-2 at 1-2); the formation of the Northern Ireland Human Rights Commission (Exh.77-2 at 2); a reduction in the deployment of British military troops to Northern Ireland, to the lowest levels since the 1970s (Exh.77-2 at 2); a determination that the primary paramilitary organizations are abiding by the cease-fire (Exh.77-2 at 4); and the scheduled creation of a police ombudsman to undertake independent investigations of the police (Exh.77-2 at 7).

---

(2) The Good Friday Agreement, entered into on April 10, 1998, by the major political parties of Northern Ireland, set forth new constitutional arrangements for Northern Ireland. Most significantly, the agreement provided that Northern Ireland will remain part of the United Kingdom unless a majority of its people votes otherwise. The agreement also outlined the frame work for the Northern Ireland Assembly. the agreement was approved by 71% of Northern Ireland's voters and was then given a legislative imprimatur by Parliament (Exh. 77-3 at 1-2).

(3) Exhibit 77 is a group exhibit containing 39 tabs attached to aMay 19,2000, letter from the government and another 16 tabs attached to a second letter of the same date. All references to "Exh. 77-2" and "Exh.77-3" refer, respectively, to the 1999 and 1998 Country Reports on Human Rights Practices for the United Kingdom, as located at the second tab following the second letter.

Finally, inasmuch as we have concluded that the respondents have not suffered past persecution, we necessarily disagree with the Immigration Judge's assessment (I.J. at 60) that the respondents experienced persecution that was sufficiently severe to warrant a grant of asylum despite the changed conditions in Northern Ireland. *See Matter of Chen,* 20 I&N Dec. 16 (BIA 1989). We therefore reverse the Immigration Judge's decision to grant the respondents' requests for asylum.

Since the respondents have failed to satisfy the lower burden of proof required for asylum for the reasons discussed above, it follows that they have failed to meet the higher standard for withholding of removal. *See INS v. Stevic,* 467 U.S. 407 (1984).

The respondents have likewise failed to establish that it is more likely than not that they would be tortured upon return to the United Kingdom, and their request for relief under the Convention Against Torture must also be denied. *See Matter of G-A-,* 23 I&N Dec. 366, 367-68 (BIA 2002). The respondents have failed to prove that the governments of Northern Ireland or the United Kingdom would torture them upon their return. The mere possibility of abuse by certain elements is hot the material issue. Rather, to demonstrate eligibility for relief under the Convention Against Torture, the respondents must prove that they more likely than not face "torture" by government officials or with the acquiescence of government officials. The record does not support the finding that the respondents will more likely than not be detained and, if detained, that they more likely than not will be tortured. *See Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002). Moreover, the record does not support the conclusion that, even if the respondents face torture by certain elements, the torture would be with the government's acquiescence. *See Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

As a final matter, it appears that the respondents are statutorily eligible for voluntary departure, and we will grant their applications for such relief. *See* section 240B(b)(1)(C) of the Act, 8 U.S.C. § 1229c(b)(1)(C).

In accordance with the foregoing, the following orders will be entered.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: In lieu of removal, and conditioned upon compliance with the provisions of the statute, the respondents are permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order, or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c) and (f). In the event that the respondents fail to depart or comply with the conditions set forth below, the respondents are ordered removed to the United Kingdom.

FURTHER ORDER: The respondents must post a voluntary departure bond in the amount of $500 with the district director within 10 business days of the date of this order. If the bond is not posted within 10 business days, the order of voluntary departure is automatically vacated on the following business day, and the respondents are ordered removed to the United Kingdom.

FURTHER ORDER: The respondents must provide to the Department of Homeland Security appropriate travel documentation, sufficient to assure lawful entry into the country to which the respondents are departing, within 30 days of this order or within any extension beyond that time as maybe grated by the district director.

NOTICE: if the respondents fail to depart the United States within the time period specified, or any extensions granted by the district director, the respondents shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245,248, and 249 of the Immigration and Nationality Act. *See* section 240B (d) of the Act.

/s/ Frederick D. Hess

FOR THE BOARD

U.S. Department of Justice Decision
of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A73 629 577 – Newark
Date: Nov 17 2003

In re: MALACHY McALLISTER (1)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Eamonn Dornan, Esquire.

ONE BEHALF OF DHS: Kathleen Hogan
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act
[8 U.S.C. §1182(a)(6)(A)(i)] - Present without being admitted or paroled

---

(1) Separate decisions are being issued in the cases of respondent's wife and children.

Lodged:

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227.(a)(1)(B)] - In the United States in violation of law

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227.(a)(4)(B)] - Terrorist activity as defined in section 212(a)(3)(B)(i)(III), I&N Act [8 U.S.C. § 1182(a)(3)(B)(i)(III)]- Incited terrorist activity

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at the time of entry or adjustment of status under section 212(a)(2)(A)(i)(I), I&N Act[8 U.S.C § 1182(a)(2)(A)(i)(I)]-Crime involving moral turpitude

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at the time of entry or adjustment of status under section 212(a)(2)(B) I&N Act[8 U.S.C § 1182(a)(2)(B)]- Multiple criminal convictions

APPLICATION: Removability; asylum; withholding of removal; Convention Against Torture; voluntary departure

---

The respondent, a native and citizen of the United Kingdom, specifically Northern Ireland, challenges the Immigration Judge's October 11, 2000, decision that (l) ruled that the respondent is removable under section 237(a)(1)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(1)(A), for being inadmissible at the time of his entry for having been convicted of(a) a crime involving moral turpitude (a "CIMT")(fn2) and (b) two crimes having an aggregate sentence of at least 5 years;(fn3) (2) ruled that the respondent is removable under section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B), for having engaged in terrorist activities; (3) denied the respondent's applications for asylum and withholding of removal under sections 208 and 241 (b)(3) of the Act, 8 U.S .C. § *1158,* 1231 (b)(3), and for relief under the Convention Against Torture ("CAT"); and (4) denied the respondent's application for voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c.(fn4) On November 7, 2003, the respondent also filed a Motion to Remand in order to seek anew hearing on his request for deferral of removal under the CAT. The appeal will be dismissed, and the motion will be denied.

Removability

We first review the charge that the respondent is removable under section 237(a)(4)(B) of the Act for having engaged in terrorist activities.(fn5) As a preliminary matter, we address several challenges made by the respondent to the Immigration Judge's interpretation of the Act. The respondent's first challenge to the Immigration Judge's finding of removability on this ground is that the statutory provision is unconstitutional as a violation of both due process and the Eighth Amendment. *See* Respondent's Brief at 20.

---

2. The applicable inadmissibility ground would be section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 11 82(a)(2)(A)(i)(I).

3. The applicable inadmissibility ground would be section 212(a)(2)(B) of the Act, 8 U.SC. § 1182(a)(2)(B).

4. The respondent raised additional challenges on appeal regarding the Immigration Judge's admission of certain documents into evidence and the alleged disclosure of information in an asylum application to a third party. *See* Respondent's Brief at 3; Notice of Appeal. However, the respondent neglected to provide any further facts or arguments on these points. We therefore will deem these challenges abandoned.

However, “[i]t is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer.” *Matter of Fuentes-Campos,* 21 I&N Dec. 905, 912 (BIA 1997). The respondent also argues that as a matter of statutory construction, the provision should be read to exclude the respondent’s actions inasmuch as he did not target noncombatants. *See* Respondent’s Brief at 21. We disagree. ‘Where the language of the statute is clear, the inquiry i ended. The unambiguously expressed intent of Congress must be given effect.” *Matter of Fuentes-Campos, supra,* at 907 (citing *Chevron, US.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). As the Immigration Judge correctly noted, a plain reading of the statutory provision in question reveals that Congress did not include an exception to removability for terrorist activities that, in other contexts, may be deemed political offenses (I.J. at 32). Nor is there a limited exception for actions not aimed at civilians. Neither may we read such exceptions into the Act. *See Sale v. Haitian Centers council, Inc.,* 509 U.S. *155,* 168 n. 16 (1993) (stating that courts “may not add terms or provisions where Congress has omitted them”).(fn6)

---

5. Subsequent to the Immigration Judge’s decision in this case, former section 212(a)(3)(B)(ii) (“Terrorist Activity Defined”) and section 212(a)(3)(B)(iii) (“Engage in Terrorist Activity Defined”) of the Act were amended by section 4 11(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (“USA PATRIOT ACT”). Former section 21 2(a)(3)(B)(ii) was redesignated section 21 2(a)(3)(B)(iii), and former section 21 2(a)(3)(B)(iii) was redesignated section 212(a)(3)(B)(iv). The amendments to section 212(a)(3)(B) were given retroactive effect by section 41 1(a)(1)(C) of the USA PATRIOT ACT.

Finally, the respondent argues that the terms of the Geneva Convention and principles of customary international law mandate a finding that the respondent did not engage in terrorist activities. *See* Respondent's Brief at 22-35. We have considered this question before. "[N]either the Geneva Convention nor customary international law creates a potential remedy from deportation that can be sought by individual aliens in deportation proceedings over and above that provided by the Act, as implemented by regulation. Additionally, we [have held that 'even if it were assumed that customary international law could provide a basis for individual aliens to assert a right that their deportation be withheld,. . . (t)he authority to consider such requests has not been delegated by the Attorney General to the immigration judges or this Board." *Matter of A-E-M-*, 21 I&N Dec. 1157, 1162 (BIA 1 998) (alteration in original) (quoting *Matter of Medina,* 19 I&N Dec. 734, 746 (BIA 1988)). We thus are without authority to consider any argument that the respondent's activities were not of a terrorist nature due to the political or military situation in Northern Ireland.

---

6. We need not reach the respondent's argument that the broad wording of section 212(a)(3)(B)(iii)(V) of the Act could technically support the removal of an alien as a terrorist based upon his or her use of a firearm or other weapon with the intent to endanger another person or property, notwithstanding the complete absence of a broader political or social motive. Such a factual scenario is not presented in this case, and we decline to address the question whether there might be an exception to the definition of "terrorist activity" for the use of strictly ordinary weapons by common criminals

Having dismissed the respondent's arguments on the above points, we need only apply the language of section237(a)(4)(B)to the facts in evidence. The respondent was convicted of "unlawful and malicious wounding with intent to do grievous bodily harm" and "conspire to murder (Exhs. 6, 7). The first conviction, involving the respondent's role as an armed look-out while co-conspirators fired shots at an RUC officer, meets the statutory standard for terrorist activity: the respondent's use of a firearm with the intent to endanger, directly or indirectly, the safety of another individual. *See* section 212(a)(3)(B)(iii)(V) of the Act The second conviction, involving the respondent's participation in a conspiracy to kill an RUC officer with a firearm, also meets the statutory definition for terrorist activity under section 212(a)(3)(B)(iii)(V), (VI). Having committed terrorist activities with the intention to cause death or serious bodily injury, the respondent has "engaged in terrorist activities." *See* section 212(a)(3)(B)(iv) of the Act. The respondent is, therefore, removable under section 237(a)(4)(B) of the Act.

The respondent also claims that he is not removable under section 237(a)(l)(A) of the Act as an alien who was inadmissible at the time of his entry. Specifically, the respondent argues that his convictions fall within the "purely political offense" exceptions to the inadmissibility grounds of sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B) of the Act. The respondent was convicted in Northern Ireland of "conspire to murder" and "unlawful and malicious wounding with intent to do grievous bodily harm" and sentenced to 7 years (Exhs.6,7). The Immigration Judge ruled that the respondent had been convicted of two CIMTs whose aggregate sentences exceeded *5* years and that the respondent was therefore removable under both section 237(a)(l)(A) charges (I.J. at 26-27). The question whether these convictions are excepted from the inadmissibility grounds as "purely political offenses" lies in a largely unchartered area of the law. However, our conclusion that the respondent is removable under section 237(a)(4)(B) of the Act as one who has engaged in terrorist activities obviates any need to determine whether he is also removable under this additional ground.

Relief from Removal

Having determined that the respondent is removable under section 237(a)(4)(B) of the Act for engaging in terrorist activities, we affirm the decision of the Immigration Judge that the respondent is statutorily ineligible for asylum pursuant to section 208(b)(2)(A)(v) of the Act, 8 U.S.C. § 11 58(b)(2)(A)(v) (U. at 38). We likewise affirm the decision of the Immigration Judge that the respondent, being removable under section 237(a)(4)(B), is statutorily ineligible for withholding of removal under section 241(b)(3)(B)(iv) of the Act, 8 U.S.C. § 123 1(b)(3)(B)(iv), as an alien who is a danger to the security of the United States (1.1 at 4.0). The Act provides that "an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." Section 241 (b)(3)(B) of the Act.

We agree with the Immigration Judge that the respondent is barred from withholding of removal under the CAT (I.J. at 41). Inasmuch as the respondent is barred from eligibility for withholding of removal under section 241(b)(3) of the Act as one who is reasonably believed to be a danger to the security of the United States, he is likewise barred from eligibility for withholding of removal under the CAT. *See* 8 C.F.R. § 1208.1 6(d)(2). However, if the respondent were to establish that it is more likely than not that he would be tortured if removed to the United Kingdom, he would nevertheless be entitled to deferral of removal under the regulations implementing the CAT. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 279 (A.G. 2002); 8 C.F.R. § 1208.16(c)(2), 1208.17(a).

An act will be considered torture if it (1) causes severe physical or mental pain or suffering; (2) is intentionally inflicted; (3) is intended for prohibited purpose; (4) is inflicted by, at the instigation of, or with the consent or acquiescence of a public official; *(5)* does not arise from lawful sanctions; (6) is directed against a person in the offender's custody or physical control. *See* 8 C.F.R. § 1208.18(a). To assess the likelihood that the respondent would suffer torture in Northern Ireland, all relevant evidence must be included, including evidence of past torture of the respondent, evidence that the respondent could relocate to apart of the United Kingdom where he is not likely to be tortured, and evidence of gross, flagrant, or mass violations of human rights within the United Kingdom. *See* 8 C.F.R. § 1208.16(c)(3). We note that included in the definition of torture is "prolonged mental harm caused by or resulting from: (i)the intentional infliction or threatened infliction of severe physical pain or suffering;. . . (iii) the threat of imminent death;, or(iv) the threat that another person will imminently be subjected to death [or] severe physical pain or suffering." 8 C.F.R. § 1208.1 8(a)(4). Among the proscribed purposes that may be shown to meet the definition of torture are "obtaining information or a confession; punishment for a victim's or another's act; intimidating or coercing a victim or another; or any discriminatory purpose." *Matter of J-E-, 23* I&N Dec. 291, 298 (BIA 2002)

On appeal, both the Department of Homeland Security ("DHS," formerly the Immigration and Naturalization Service) and the respondent have cited hultip1e items of evidence that militate toward or against a finding of human rights violations by government officials in Northen Ireland. *See* Respondent's Brief at 52*;* DHS's Brief at 64-66. Both parties have likewise cited multiple items of evidence with regard to the absence or existence of (i) acquiescence by government officials of the violent actions of loyalist forces in Northern Ireland or perhaps even (ii) the possible collusion between government officials and those loyalist forces. See DHS's brief at 78; Respondents Brief at 51-56.

Based upon our review of the evidence, we find that the record does not support the conclusion that the respondent would, more likely than not, face torture in the United Kingdom. (fn7) In a letter assessing the asylum application of the respondent, the Bureau of Democracy, Human Rights and Labor of the United States Department of State reports:

> Although sectarian violence continues to affect members of both [Catholic and Protestant] communities, Catholic nationalist[s] freely go about their lives in Northern Ireland. Catholic nationalists of all opinions hold prominent positions in business, government, education and other walks of life. Sinn Fein is a legal political party whose officials openly...campaign and hold office...The same holds true for former IRA supporters and members who have previously been convicted and have served prison terms for criminal and/or terrorist offenses. Many of these individuals participate openly in the political process and some hold public office in Northern Ireland. Although British courts have reversed a few past criminal and/or terrorist convictions due to irregular police practices, there is no reason to believe, such practices continue or that British authorities extra-legally target or persecute anyone in Northern Ireland.

(Exh.13). "[W]e note that country condition profiles developed by the State Department have been found to be 'the most appropriate and perhaps the best resource' for information on conditions in foreign nations." *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) *(quoting Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. *1995)).*

Moreover, in 2000 the State Department reported that "[i]n support of the Good Friday Agreement (fn8), the Government continued during the year to release prisoners affiliated with paramilitary organizations that maintain a cease-fire" (Exh.77-2 at 2)(fn9). Further progress in Northern Ireland is evident in the form of: the devolution of power from Parliament to the new elected Assembly, whose Executive included representatives from both unionist and nationalist parties (Exh.77-2 at 1-2); the formation of the Northern Ireland Human Rights Commission (Exh.77-2 at 2); a reduction in the deployment of British military troops to Northern Ireland, to the lowest levels since the 1970s (Exh.77-2 at 2); a determination that the primary paramilitary organizations are abiding by the cease-fire (Exh.77-2 at 4); and the scheduled creation of a police ombudsman to undertake independent investigations of the police (Exh.77-2 at 7).

We agree with the Immigration Judge (I.J. at 41-42) that the respondent has failed to prove that the governments

---

7. The DHS has argued that the respondent could safely relocate within the United Kingdom, the Republic of Ireland, or the European Union. *See* DHS's Brief at *67-75.* However, only the respondent's ability to relocate to another part of the United Kingdom, "the country of removal," is relevant in connection with the respondent's CAT application. *See* 8 C.F.R. § 1208.1 6(c)(3)(ii).

of Northern Ireland or the United Kingdom would torture him upon his return. The mere possibility of abuse by certain elements is not the material issue. Rather, to demonstrate eligibility for deferral of removal, the respondent must prove that he more likely than not faces "torture" by government officials or with the acquiescence of government officials. The record does not support the finding that the respondent will more likely than not be detained and, if detained, that he more likely than not will be tortured. *See Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002). Moreover, the record does not support the conclusion that, even if the respondent faces torture by certain elements, the torture would be with the government's acquiescence. *See Matter of Y-L-, A-G-, & R-S-R-, supra; Matter. of J-E-, supra.* Thus, we will affirm the Immigration Judge's decision to deny the respondent's request for deferral of removal to the United Kingdom.

---

8. The Good Friday Agreement, entered into on April 10, 1998, by the major political parties of Northern Ireland, set forth new constitutional arrangements for Northern Ireland. Most significantly, the agreement provided that Northern Ireland will remain part of the United Kingdom unless a majority of its people votes otherwise. The agreement also outlined the framework for the Northern Ireland Assembly. The agreement was approved by 71% of Northern Ireland's voters and was then given a legislative imprimatur by Parliament (Exh.77-3 at 1-2).

9. Exhibit 77 is a group exhibit containing 39 tabs attached to a May 19,2000, letter from the government and another 16 tabs attached to a second letter of the same date. All references to "Exh 77-2" and "Exh 77-3" refer, respectively, to the 1999 and 1998 Country Reports on Human Rights Practices for the United Kingdom, as located at the second tab following the second letter.

We likewise will deny the respondent's motion to remand proceedings to seek a new hearing on his request for deferral of removal under the CAT. Although the respondent's motion contains what purports to be new evidence bearing on his application for relief, we do not find that the respondent's submission alters our conclusion above regarding current conditions in Northern Ireland. Even if some level of collusion between elements of the British government and loyalist forces in Northern Ireland can be shown with regard to the persecution of Catholic or republican individuals in past years, the respondent has proffered insufficient evidence of any continuing collusion or on-going threat to his safety. Given the current state of the record, we do not find that the respondent has presented a prima facie case of eligibility for deferral of removal under the CAT as would justify a remand to the immigration court. *Matter of Coelho,* 20 I&N Dec. 464 (BIA 1992).

As final matter, we affirm the Immigration Judge's conclusion that the respondent is statutorily ineligible for voluntary departure as one who is removable under section 237(a) (4) of the Act (IJ at 42). *See* section 240B(b)(1)(C) of the Act, 8 U.S.C. § 1229c(b)(l)(C).

In accordance with the foregoing, the following orders will be entered.

ORDER: The respondent's appeal is dismissed with respect to the finding of removability under section 237(a)(4)(B) of the Immigration and Nationality Act.

FURTHER ORDER. The respondent's appeal is dismissed with respect to the denial of his applications for asylum, withholding of removal, withholding of removal under the Convention Against Torture, deferral of removal under the Convention Against Torture, and voluntary departure.

FURTHER ORDER: The respondent's motion to remand is denied.

/s/ Frederick D. Hess

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

In Removal Proceedings

In the Matters of

Malachy McALLISTER,	(A # 73-629-577);
Sarah B. McALLISTER	(A# 73-551-831);
Paul McALLISTER,	(A# 73-551-832)
Mark J. McALLISTER,	(A# 73-551-833);
Nicola McALLISTER,	(A# 73-551-834);
Sean R. McALLISTER	(A# 73-551-835);

Respondents. :

CHARGES INA § 237(a)(l)(B) (Alien Present in Violation Law);

INA § 237(a)(1)(A) / INA § 212(a)(2)(A)(i)(l) Alien Convicted for Crime Involving Moral Turpitude);(fn1)

INA § 237(a)(1)(A) /1NA § 212(a)(2)(B) (Alien Convicted for Two or More Offenses with an Aggregate Sentence to Confinement of Five Years or More) (fn2)

INA § 237(a)(4)(B) (Alien Engaged or Has Been Engaged in Terrorist Activity).(fn3)

APPLICATIONS: INA § 208 (Asylum);

INA § 24 l(b)(3) (Withholding of Removal);

Withholding and Deferral of Removal pursuant to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment: (fn4)

INA § 240B (Voluntary Departure).

1Applicable only to Malachy McAllister.
2Applicable only to Malachy McAllister.
3Applicable only to Malachy McAllister

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46 (annex, 39 U.N. GAOR Supp. (No. 51) at 197), U.N. Doe. A139/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Torture Convention").

DECISION AND ORDER

OF THE IMMIGRATION JUDGE

I. Procedural History

The respondents are a family of six from Belfast, Northern Ireland. Malachy and Sarah McAllister and their children - Paul, Mark, Nicola, and Sean - entered the United States on March 6, 1996, at a designated port of entry in Niagara Falls, New York. They were admitted as nonimmigrant visitors for pleasure, but remained in this country beyond the time period permitted by their status. Consequently, on March 5, 1999, the Immigration and Naturalization Service ("Service") instituted removal proceedings by serving the respondents with Notices To Appear. See INA § 239(a)(l).

Each of the respondents have conceded removability on the charge that they overstayed their authorized period of time in the United States. (S. Exhibits 1A, 40A, *54A, 58A,* 60A, 62A.) Mr. McAllister, however, contests the Service's charges that he is removable as an alien who has 1) committed a crime involving moral turpitude, 2) been convicted for two or more offenses with an aggregate sentence to confinement of five years or more, and 3) is engaged, or has been engaged in terrorist activity. Exhibit IA.) The respondents have applied for relief from removal in the forms of asylum, withholding of removal, withholding and deferral of removal pursuant to the Torture Convention, and voluntary departure.

After a series of pretrial motions and subsequent rulings,(fn5) this court set the case for trial.

---

5. Special Exhibit I chronicles the pre-trial litigation by setting forth each of the pre-trial motions and orders in this case.

Testimony began on June 12, 2000, and continued through June 16, 201O. The trial resumed on August *15*, 2000, and concluded on August 23, 2000, with this court reserving decision. (fn6)

II. Record of Proceedings - Documentary Evidence and Testimony

The Record of Proceedings contains fifty-four audio cassette tapes, two videotapes, and one hundred and twenty-two exhibits, including Special Exhibit I, which contains pretrial motions and orders lettered "A" - "JJ."(fn7) Over the course of twelve trial days, sixteen witnesses testified before this court. This court has carefully reviewed, analyzed, and considered each and every piece of testimonial and documentary evidence in formulating its decision in this matter. This written decision will discuss, in detail, the salient evidence in this case. While the exhibits speak for themselves, a copious recitation of each witness's testimony would be cumbersome and unnecessary. However, to the extent that an individual witness's testimony impacts a specific issue, it will be discussed in appropriate detail. A brief synopsis of each witness's testimony should serve to frame the context of the proceedings.

The Service began its case-in-chief by presenting INS Special Agent Christopher Croteau, who testified at length about the gathering and certification of foreign documents obtained by the Service from Northern Ireland. Agent Croteau obtained the foreign conviction records which were the basis of the Service's case against Malachy McAllister. Professor Paul Wilkinson, from the University of St. Andrews in Scotland, testified extensively as an expert regarding the history and current status of the conflict in Northern Ireland, the use of terrorism within the conflict, and the organization and operations of various paramilitary groups involved in the struggle. Special Exhibit I "L" at tab

2.) The Service later re-called Professor Wilkinson as a rebuttal witness at the conclusion of the respondents' case. W. Hays Parks, Special Assistant to the Judge Advocate General of the United States Army, testified as an expert on the rules of military engagement, legitimate military targets, and the law of war as applied to individuals allegedly engaged in terrorist acts. (Special Exhibit I "L" at tab 1.)

At the conclusion of the Service's presentation, the respondents tendered their first witness, Dr. J. Bowyer Bell, an adjunct professor at Columbia University. (Exhibit 64.) Dr. Bell testified as an expert in the history and present state of the Northern Ireland conflict. The respondents' second expert, Jack Holland, an author and adjunct professor at New York University, provided testimony concerning the history and activities of the Irish National Liberation Army ("INLA"), a Nationalist paramilitary group of which Mr. McAllister admitted being a member. (Exhibit 67.) Anne Robinson, Sarah McAllister's mother, testified about the events of October 2, 1988 - the night masked men attacked the McAllister's rented home at 15 Farnham Street in Belfast.

---

6. It is important to note that this court reserved decision on each of the respondent's cases except for Mark's. As discussed below in further detail, Mark's case will be continued pending the resolution of separate criminal charges pending against him, the outcome of which may impact his applications for relief.

7Addendum A of this decision contains a complete list of the exhibits in this case. Addendum B contains a complete list of Special Exhibit I.

The respondents presented Paul O'Connor, project coordinator at The Pat Finucane Center in Belfast. *(* Exhibit 69.) Mr. O'Connor offered expert testimony on policing techniques practiced in Northern Ireland. Ms. Jane Winter, director of the British Irish Rights Watch, testified as an expert regarding the conflict in Northern Ireland, and more specifically, collusion between the security forces and paramilitary groups. *(* Exhibit 70.) Julia Hall, a staff attorney with the Europe and Central Asia Division of Human Rights Watch, testified as an expert on the Royal Ulster Constabulary ("RUC") and the conflict in Northern Ireland in the context of international human rights. *(* Exhibit 66.)

Mark and Paul McAllister, Mr. and Mrs. McAllister's eldest sons, each testified about their experiences in Northern Ireland in support of their individual asylum applications. Padraigin Dnnan, a solicitor practicing in Belfast, testified about her experiences representing ethnic minorities and individuals charged with criminal offenses. Exhibit 91.) While she was not qualified as an expert witness, Ms. Drinan' s poignant and candid testimony provided this court with greater insight into the workings of the criminal justice system in Northern Ireland. Dr. Christopher H. Pyle, professor of politics at Mount Holyoke College, testified exclusively as an expert on the application of the political offense exception in federal extradition proceedings. (Exhibit 90.)

Malachy McAllister testified about his experiences growing up in Northern Ireland as a Nationalist Catholic. He detailed his many encounters with the security forces, and discussed his involvement with the INLA, as well as his subsequent criminal convictions stemming from his various INLA-related activities. He also described the attack on his home and his family's flight to Canada, and later the United States. Sarah McAllister testified about her own experiences growing up in Northern Ireland. She described many of the same events as did Mr. McAllister, but also provided information regarding incidents that happened to her personally. She too detailed their flight from Northern Ireland and the effect it had on their family. The final witness was Dr. Richard A. Falk, the Albert G. Milbank professor of international law and practice at Princeton University. (see Exhibit *65.)* Dr. Falk testified on the law of war, legitimate military targets, and the treatment of alleged terrorists under international law.

III. Facts.

The Troubles

The conflict in Northern Ireland has a long and sordid history. In this case alone it took a number of highly qualified experts to deliver a complete picture of the struggle, and even then there were historical disagreements. This brief synopsis of the struggle is included solely to provide a frame of reference for the McAllister's claims.

Euphemistically referred to as "the Troubles," the modern Northern Ireland conflict dates back to August 14, 1969, when British troops arrived in Northern Ireland in response to the Battle of the Bogside, which erupted after a Protestant march through Derry/Londonderry. *($* Exhibit 71, Tab A, 3.) Catholics refer to the town as Derry, while Protestants refer to it as Londonderry.

This battle came on the heels of a two year Catholic civil rights campaign .challenging the Protestant establishment. See id.

While the introduction of the British army may have had the long term effect of escalating the violence, it was by no means the root cause of it. The British army's purported purpose was to aide the RUC, Northern Ireland's civilian police force, in containing and combating the Protestant/Catholic violence. This was a conflict that had been raging for more than eight hundred years. 4. Ireland was long the subject of British colonial policy until 1921, when the southern counties of Ireland achieved home rule. The Protestant dominated northern six counties, however, were not included and became a province of the United Kingdom — Northern Ireland. See id.

At its core, the struggle concerns who should rightfully rule Northern Ireland. Confounding the conflict is the fact that the struggle runs across both political and religious lines. Generally, Catholics are associated with the Republican or Nationalist movement, the goal of which is a reunified Republic of Ireland free from British rule. Protestants, conversely, are most commonly aligned with Loyalist or Unionist groups, which strive to preserve British rule in the northern six counties. Equal antagonists, each side is armed with dedicated paramilitary groups, as well as more passive political wings to forward their causes. Unfortunately, bullets, rather than ballots, have defined the struggle.

The respondents in this case lived in Northern Ireland during the height of the conflict. Mr. and Mrs. McAllister grew up as Catholics and later joined the Nationalist movement. As a young man, Mr. McAllister resented what he perceived as discrimination and persecution at the hands of the RUC and British army, and later took an active role in the struggle as a member of the INLA. Ingrained in their society, "the Troubles" touched each of the McAllisters' lives.

The McAllisters

Malachy McAllister was born on August 5, *1957,* in Belfast, Northern Ireland. One of six children born to a long distance lorry driver and his wife, he lived in the Markets, a largely Nationalist/Catholic area surrounded by predominantly Loyalist/Protestant neighborhoods. While this enclave provided Catholic children some degree of insulation from the ongoing conflict, it did not provide complete protection. Mr. McAllister's introduction to the violence that has long wracked Northern Ireland came in 1966, when he was nine years old.

Mr. McAllister recalled that Ian Paisley led a group of Apprentice Boys, a sub-organization of the Protestant Orange Lodge Order, on a march through the Markets. When the local residents attempted to block the parade from continuing down their streets, the RUC aggressively beat them back. Mr. McAllister reports witnessing a neighbor suffer a direct blow to his head from an RUC officer's baton. Even at his young age, Mr. McAllister was involved in the melee — gathering bricks and bottles to supply the adults, who were hurling them at the RUC. He testified that as he got older, he participated in "sit-ins" and carried placards to protest sub-standard housing conditions and perceived voting inequities.

Mr. McAllister testified that he remembers the British army's arrival into Northern Ireland in 1969. He stated that the army's presence brought a sense of relief and security to the minds of Catholics, who had previously been subject to Protestant violence and random Loyalist attacks without a champion. Mr. McAllister reports that these feelings were soon dashed, however, when the army and RUC began collaborating on patrols and investigations, forming what is commonly referred to as the "security forces." On one occasion after the shooting death of a British soldier, British forces searched every home in the Markets, including Mr.

McAllister's. Mr. McAllister, and the Catholic/Nationalist community as a whole, quickly perceived the British army as peers of the RUC, rather than as dedicated neutral peacekeepers.

In 1971, Mr. McAllister's family moved to the Lower Ormeau Road, another Nationalist area in Belfast, but at the time, widely regarded as safer than the Markets. Mr. McAllister testified that this move was prompted by on-going violence in the Markets, which forced him and his family to seek protection under their beds for hours at a time. Mr. McAllister testified that as a result of the constant fighting, his mother's "nerves were shot," so she moved her family to the Lower Ormeau Road in search of tranquility.

While Mr. McAllister's mother's intentions were good, the reality was that the Lower Ormeau Road, with the recent influx of Catholic families, became a target for Loyalist violence. As Mr. McAllister explained, the area was surrounded by Protestant strongholds, making it easily accessible for Loyalists to carry-out attacks and then retreat to their own communities. Even Mr. McAllister' s daily trip to school was marred by violence as he had to fight with Loyalist youths on his way to and from school. Because of these attacks and the increasing degree of accompanying violence, the Lower Ormeau Road was dubbed "Murder Mile" in the local community.

Mr. McAllister testified about many of his early encounters with the security forces on the Ormeau Road. He described repeatedly being stopped, often many times in the same day, searched, and asked his name, address, and where he was going. As he described it, if there was any hesitation or disobedience, a verbal insult or blow with a rifle butt was not an uncommon occurrence. Mr. McAllister testified that this type of treatment occurred on a daily basis, not just to him, but to Catholics as a group.

After leaving school at the age of fourteen, Mr. McAllister took his first job as a tire fitter at a garage in a largely Protestant area. Mr. McAllister endured verbal barbs from Protestant coworkers, who apparently had nothing but contempt for him. After two months on the job, three Protestant youths verbally assaulted him as he left a bakery. They warned him that if he maintained his employment at the garage, he would be shot because he was taking ajob opportunity away from a Protestant. Despite this threat, Mr. McAllister remained at the garage. He decided to leave, however, after a second group of Protestants "gave him a kickin' while he was working on a car parked just outside of the building. After this attack, the group again warned him that he would be shot if he returned. The garage manager phoned the RUC, who advised Mr. McAllister to heed the group's warning and not refer to the area.

In November of 1973, after taking an interim job at another garage fitting tires, Mr. McAllister entered a year-long government sponsored apprenticeship program in a Catholic area of West Belfast to learn the bricklaying craft. To get to the apprenticeship, Mr. McAllister had to walk past his prior place of employment, and then take a Black Taxi the rest of the way. During this time, Mr. McAllister continued to have frequent contact with the security forces. He testified that to avoid confrontations with the security forces and Loyalist groups, he stayed off of the Ormeau Road proper, primarily using alleyways and side streets to get to and from his destinations. This stealth method of travel, however, failed to shield him from detection. He continued to encounter British foot patrols, and on one occasion, had a rifle forcibly inserted into his mouth as a not-so-subtle warning to stay out of trouble. He was sixteen years old at the time.

Around this same time, Mr. McAllister's friend, Robert Millen, a Protestant living on Belmore Street in the Lower Ormeau Road area, was murdered by a Loyalist group because he associated himself with Catholics. Mr. McAllister had been with him immediately prior to his murder, and actually heard the gunshots and the car squealing from the scene. He testified that he ran to his friend's aid, but could do nothing to help him. Millen had been shot in the chest and was having difficulty breathing. He died on the way to the hospital.

While Mr. McAllister was stopped by the RUC and British army patrols on innumerable occasions, he was not formally arrested until he was sixteen years old. On that occasion, Loyalists came into the Lower Ormeau Road area, attacking homes and breaking windows. Believing that the security forces were either willfully blind or knowingly permitting the Loyalists to carry out these attacks, Mr. McAllister and other local Catholics attacked the security forces with bricks and bottles. Mr. McAllister testified that he was arrested by British soldiers, placed face down in the back of an army Land Rover with his hands behind his back, and driven away while soldiers forcefully pinned him to the floor with their boots. He was taken to Grand Central barracks, an army installation in the center of Belfast. No charges were filed and he was later released.

In 1974, members of the Ulster Volunteer Force ("UVF") bombed the Rose & Crown Pub, a popular Nationalist hangout located on the Lower Ormeau Road. Both Mr. and Mrs. McAllister testified that they remembered the bombing and knew people who died as a result of it. When the Rose & Crown reopened after reconstruction in *1975,* Mr. McAllister took a job there as a doorman. At around 10:00pm on a night when Mr. McAllister was working, his friend, Jim Templeton, was gunned down by Loyalists in a drive-by shooting. Ducking inside the bar, Mr.

McAllister avoided injury, but saw that Templeton had been hit. Tending to Templeton himself, Mr. McAllister sent another friend, Jim Prior, for help. Templeton later died in the hospital from his injuries.

By this time, Mr. McAllister had been dating Sarah Bernadette Robinson for approximately two years. The two eventually married on November 11, 1978. Mrs. McAllister was born in Belfast on May 10, *1958,* and lived on the Falls Road. She and her family later moved to Shore Road, a mixed Catholic/Protestant area, and again in 1967, to the Lower Ormeau Road.

Mrs. McAllister testified that she remembers protesting housing conditions, employment opportunities, and voting inequities as part of the general civil rights movement of her youth. Her earliest memory of political violence dates back to when she was eight or nine years old. She was walking home from school and observed a civil rights protest in progress. Local women and children had formed a human roadblock by sitting on kitchen chairs in the middle of the street. Mrs. McAllister recalled that violence erupted when the security forces arrived and forcibly removed the protestors from the road.

On another occasion, she and thousands of other Catholics marched down the Lower Ormeau Road. When they went by Donegall Pass, a Protestant community, Loyalists pelted them with stones, bottles, and bricks. Although security forces were present, Mrs. McAllister testified that they did not act to protect the marchers.

Mrs. McAllister testified that she remembers the British army's arrival in 1969. At first, Mrs. McAllister and others were relieved that help was coming. The hope was that the soldiers would cleanup Belfast, which Mrs. McAllister described was a "war zone" at the time. Mrs. McAllister recalled that as a young girl she played on British tanks and delivered sandwiches and cups of tea to the soldiers. However, the camaraderie did not last, and British soldiers began teaming with RUC officers in raids on Catholic homes. Mrs. McAllister described the disenchanted Catholic sentiment:

"They turned against us."

Mrs. McAllister testified that her home was not among those searched by the newly formed British/RUG forces. She does, however, remember one particular occasion when soldiers with "blackened faces" entered her home while she and her family were sleeping, flashed bright lights in their faces, and then left. She stated that this was done to the occupants of every house on the street that night as a show of force and intimidation.

Mrs. McAllister's contact with the security forces closely resembles the experiences described by Mr. McAllister. She recalled being stopped on the way to school and detained for thirty minutes or so until a female officer arrived to search her. Stops like these were unpredictable — sometimes occurring six times per week, sometimes occurring once a week, and sometimes not occurring at all in a given week. Mrs. McAllister testified that soldiers and officers verbally assaulted her — calling her "dumb patty" and "scum" — but never physically harmed her in any way. These repeated experiences with the security forces led her to distrust the British soldiers because, in her view, they treated people "as if they weren't human." Her opinion of the RUC was even lower. She described the RUG as "a bunch of terrorists," and indicated that she feared RUC officers more than the British soldiers because they were more prone to irrational, violent behavior.

Like her husband's, Mrs. McAllister's difficulties were not limited to interactions with the security forces. She also testified that she encountered various conflicts with Protestant children. As she described it, the Lower Ormeau Road had no recreation or entertainment clubs for Catholic youths. Further up the Lower Ormeau, however, was a club, but to get there, Mrs. McAllister and her friends had to walk through a Protestant area. On one occasion when she and a group of her friends were returning from club, a man leapt from the bushes an a pellet gun at them Mrs. McAllister was not injured, but her friend was shot in the face.

Mrs. McAllister was not injured, but her friend was shot in the face. Violence continued to touch those with whom Mrs. McAllister was close. In early 1972, her friend's father, Mervin Walker, was killed in a drive-by shooting. Mrs. McAllister testified that she and her friend Muriel, Walker's daughter, were playing together when a car pulled up and two men gunned down Walker. The Ulster Volunteer Force ("UVF"), a Loyalist paramilitary group, later claimed responsibility for the attack. Three years later, in June of 1975, Michelle O'Connor, a three year old girl whom Mrs. McAllister had babysat for two years, was killed when her father's booby- trapped car exploded. Again, the UVF avowed responsibility for the attack.

On another occasion in August of 1975, Mrs. McAllister was visiting her friend, Angela Gallagher at a liquor store on the Ormeau Road where she worked. As the two were talking, a gunman burst into the store and ordered them to lie on the storeroom floor. The gunman then separated Mrs. McAllister from Gallagher, ordering her into another room. Hiding in the corner of the room, Mrs. McAllister heard gunshots. The gunman had shot Gallagher in each of her legs and fled. Gallagher called Mrs. McAllister for help. Fearful that the gunman had not left, Mrs. McAllister hesitated, but then went to her friend. After pleading with a nearby Protestant drug store pharmacist to summon help, Mrs. McAllister and Gallagher were taken to the hospital, where Mrs. McAllister was treated for shock.

By 1975, Mr. and Mrs. McAllister began experiencing violent incidents together. On one occasion, Mr. McAllister's former classmate, Noel Beckett, was struck by a car and killed. His death occurred after a carload of Loyalists attempted to kidnap a Catholic. In an effort to escape, the Loyalists drove up on the sidewalk and struck a group of Catholics, killing Beckett. Mrs. McAllister recalled that she could see "bodies flying into the air" as the Loyalist car sped up and down the sidewalk erratically. Mr. McAllister testified that a joint army/RUC checkpoint was located nearby, but no personnel responded to the commotion.

Mrs. McAllister recalled another incident that occurred when her husband was walking her back to her house one evening. On the way, they encountered British soldiers, who Mrs. McAllister suspected had been drinking. Mrs. McAllister testified that the soldiers ordered them to stop, but did not interrogate them as was the usual practice. Rather, unprovoked, the foot patrol assaulted Mr. McAllister and, as Mrs. McAllister described it, "beat into him really bad." The officers apparently beat Mr. McAllister to the ground and continued kicking and striking him with their rifle butts. Mr. McAllister reportedly lost a couple of teeth and, according to Mrs. McAllister, "cried like a baby" after the beating, out of both pain and frustration.

Mrs. McAllister gave birth to the couple's first child, Paul, on July 5, 1976. (Exhibit 57.) Shortly thereafter, on an evening in October of 1976, Mr. and Mrs. McAllister were walking with three month old Paul on the Ormeau Road when they were stopped by British soldiers for approximately thirty minutes. The soldiers placed Mr. McAllister against a wall, searched him, and delivered the usual line of questioning — name, address, destination, etc. They did not address Mrs. McAllister. Mr McAllister' "answered the soldiers questions and, after performing radio checks, the soldiers released the McAllisters. Some fifty yards later, another patrol of British soldiers in a Land Rover again stopped the trio. This time, Mr. McAllister was not so cooperative.

Mrs. McAllister stated that the Land Rover pulled up with soldiers already aiming rifles at them. Mr. McAllister testified that the soldiers got out of the vehicle and again fed him the usual interrogation and ordered him against the wall. Mr. McAllister reported his name as "Mickey Mouse" and refused to be searched. By this time, a group of local residents had gathered and were complaining about the troops' actions. The soldiers struck Mr. McAllister between the shoulders with a rifle butt and arrested him in front of his family. They then managed to place him into their Land Rover, despite the crowd's efforts to physically pry him from their custody. The patrol took Mr. McAllister to the Grand Central barracks, and handed him over to the RUC, which charged him with assaulting a British soldier. After a bench trial, the judge found Mr. McAllister guilty. He was sentenced to six months in jail, but only served three in the Young Prisoners Compound of the Maze Prison (also referred to as Long Kesh).

Mrs. McAllister testified that during the three months that Mr. McAllister was incarcerated, she was arrested on three separate occasions by the security forces. The first time, Mrs. McAllister was walking Paul in the stroller on Shaftesbury Avenue when the same British soldier that previously beat Mr. McAllister stopped them. He asked Mrs. McAllister her name and address and where she was going. He then placed Mrs. McAllister under arrest, but released her because Paul's stroller would not fit into his vehicle.

Approximately one week later, Mrs. McAllister was arrested for the second time. She testified that she was home with Paul one morning when soldiers arrived at her house. A female soldier placed her under arrest and brought her and Paul to Grand Central barracks in Belfast City Center, where she was questioned for four hours and then driven back to her house.

The third arrest occurred when Mrs. McAllister was walking to meet her friend. The same British soldier that had arrested her the first time stopped her and placed her under arrest. He again brought her to Grand Central barracks, where she was taken to a bathroom. Male soldiers then ordered her to stand in one of the stalls and strip down to her underwear. Mrs. McAllister testified that she was degraded and humiliated. Thereafter, the soldiers interrogated and eventually released her. Mrs. McAllister was never charged with a crime in any of the three arrests.

From 1977 to 1981, the McAllisters continued to live and work on the Lower Ormeau Road. Mrs. McAllister gave birth to their second son, Mark, on March 10, 1979. (Exhibit *59.)* The family experienced the hunger strikes and the death of Bobby Sands in 1981. This period of time, as Mrs. McAllister described it, was emotionally draining on Catholics living in Northern Ireland. Individuals who were never before involved in the struggle began actively protesting. Belfast was the scene of rioting, burning vehicles, and demolished buildings.

At this time, Mr. McAllister's brothers, Robert and Joseph, were active members of the INLA, a Nationalist paramilitary organization Mr. McAllister testified that he first learned that Robert was a member of the INLA after Bobby Sands died in May of 1981, but was not sure how long he had been involved previously. He stated that Joseph affiliated himself with the group sometime in early 1981. Mr.

McAllister himself admitted to joining the INLA in the summer of 1981. Shortly thereafter Sean McConkey, another INLA member and associate of Robert McAllister's, asked him to participate in an INLA operation.

On July 14, 1981, Joseph McAllister, Sean McConkey, and Mr. McAllister carried out a prearranged ambush on an RUC patrol. Mr. McAllister testified that two weapons — a .303 rifle and a pistol — were brought to his house the day of the operation. Disguised in ski masks, the three made their way to the Rose & Crown Pub. As planned, Joseph McAllister separated himself from the other two and intentionally broke a window in a nearby pharmacy to draw out the RUC. When the RUC patrol responded to the alarm, McConkey and Mr. McAllister were lying-in-wait. When Constable Gregory Conway got out of his vehicle to investigate what he thought was a break-in, McConkey shot him with the *rifle,* while Mr. McAllister, armed with the pistol, watched for security forces in the other direction. Mr. McAllister testified that his role was to "protect the shooter." After the attack, McConkey and Mr. McAllister, following their plan, fled out the back door of the Rose & Crown and went to a nearby house to dispose of their masks and weapons.

Several months after this incident, McConkey asked Mr. McAllister to again partake in an INLA operation. The plan this time was to attack an RUC officer in the Botanical Gardens, a location McConkey identified as a popular gathering place for RUC officers. Mr. McAllister testified that McConkey arranged for a pistol and an Uzi submachine gun to be delivered to his house. However, when the weapons arrived, Mr. McAllister refused to accept them because be was concerned that his family would return. He testified that he ultimately did accept the weapons, housing them for approximately two hours until someone returned to retrieve them. Ultimately, the Botanical Gardens plan never came to fruition.

In November of 1981, McConkey again contacted Mr. McAllister about targeting an RUC officer. At the time, Mr. McAllister was a member of the Queen's Leisure Center ("QLC"), a handball and exercise facility in Belfast. Mr. McAllister testified that he exercised and played handball there three or four times per week. McConkey evidently sought out Mr. McAllister for this operation because a suspected RUC officer was also a member of the QLC. McConkey told Mr. McAllister that this "RUC man" should be "checked out" as a possible target. To that end, McConkey joined Mr. McAllister as his guest in order to confirm this individual as a target. McConkey surveyed the club and eventually pointed out the RUC man to Mr. McAllister. Mr. McAllister testified that McConkey returned to the QLC by himself on several occasions to track the RUC officer's schedule and identify his vehicle.

Mr. McAllister testified that his role in the conspiracy to murder the RUC officer was limited. He stated that McConkey asked him to phone him (McConkey) when the RUC officer arrived at the club. Mr. McAllister did indeed place a call to McConkey, but stated that he was unaware if the RUC officer was at the QLC at the time. In any event, McConkey never answered the phone. Mr. McAllister testified that e "McConkey had answered the phone, he said I have told him that the officer was not at the QLC. Mr. McAllister testified that it "dawned on him" after the Rose & Crown incident that someone could have been "shot dead." He testified that the Crown & Rose incident was an "eye opener" and he no longer wanted to be involved in individualized violence against the RUC. He stated that be would not be able to live with himself if he was involved in that type of activity again. Mr. McAllister testified that he never wanted to be involved in McConkey's plan, but also stated that be did not tell his brothers or McConkey that he wanted to disassociate himself from the INLA. He stated that he did not want to be perceived as a "card."

Mr. McAllister testified that after the QLC incident he kept a low profile and was not involved in any INLA activities. He also stated that his wife was not aware of his involvement with McConkey or the INLA until he was arrested in February of 1982.

On February 2, 1982, at approximately 6:00am, the RUC arrived at the McAllister residence and demanded entry. According to Mr. McAllister, ten to twelve officers armed with rifles and pistols, knocked down his door, handcuffed him, and placed him under arrest. They ordered everyone out of bed and huddled them together in one room. The officers subsequently spent several hours searching the home, but discovered nothing. This was allegedly the first time Mrs. McAllister learned that her husband and his brothers were involved in the INLA. She testified that she never heard any INLA related activities being planned or observed any activities that were "extraordinary."

The RUC transported Mr. McAllister to Castlereigh. At Castlereigh, the RUC placed Mr. McAllister in a holding cell, which he described as being small, brightly lit, and windowless. He testified that he was held in the cell for two or three hours before being taken to an interview room and interrogated by Detectives Forbes and Lusty of the RUC Special Branch about his involvement in the Rose & Crown incident. Mr. McAllister denied all involvement at this point in time.

After the interrogation, Mr. McAllister returned to the holding cell for a brief period until different Special Branch officers retrieved him for additional questioning. Mr. McAllister was again interrogated concerning the events at the Rose & Crown. This time, however, Mr. McAllister was confronted with statements by McConkey and his brother Robert, who both had implicated him in the Rose & Crown attack. Mr. McAllister actually was permitted to meet with Robert, who told him that the RUC knew everything and he should "give it up." Shortly thereafter, Mr. McAllister delivered his full confession to the officers. He was then questioned in more detail about the incident at the QLC. Mr. McAllister testified that the statement be signed after that line of questioning was not completely accurate in that it implicated him in activities in which he did not participate.

Mr. McAllister was ultimately charged for his involvement in the Rose & Crown attack and the QLC incident. After being held on remand for sixteen months, he pled guilty to the charges against him. During these sixteen months, he was held at the Crumlin Road jail, and later moved to the H-Blocks of Long Kesh. In both institutions, Mr. McAllister had political prisoner status and was housed in the Republican wing with other INLA and IRA members. Mr. McAllister was sentenced to seven years on a number of counts to run concurrently, with credit for the sixteen months he had already spent in pretrial detention. Immediately prior to his release, he had surgery to remove a portion of his kidney. He was released on September 30, 1985, after serving three years and eight months of his sentence, with time off for good behavior.

During Mr. McAllister's period of incarceration, both in Crumlin Road and Long Kesh, Mrs. McAllister and their two sons, Paul and Mark, visited him weekly. Mrs. McAllister testified that hdr life was difficult while Mr. McAllister was detained. She indicated that the boys missed their father and the security forces continually harassed her. While the security forces never searched her house or arrested her during this time, they continued to stop her on the street. From the frequency of the stops, Mrs. McAllister believed that the soldiers targeted her because she was Mr. McAllister's wife and they knew the harassment annoyed and upset her.

After his release from Castlereigh, Mr. McAllister rejoined his family at 15 Farnham Street on the Lower Ormeau Road. (Exhibit 105.) He sought work as a bricklayer and purposely maintained a low profile because he feared that he would be harassed by the security forces if they discovered that he had been released from prison. He testified that the security forces soon learned that he was "back on the streets," and resumed the street interrogations, to which he had grown accustomed.

Mrs. McAllister testified that one week after Mr. McAllister's release, the family was shopping in downtown Belfast when an RUC Land Rover passed them. The patrol stopped them at the end of the street and said something to the effect of "guess who's out?" They conducted the usual brief interrogation and sent for a female officer to search Mrs. McAllister. In the meantime, the male officers proceeded to search Mr. McAllister. The McAllisters were detained for twenty minutes while they waited for the female officer to arrive. After searching Mrs. McAllister, the patrol searched the McAllister's parcels, leaving the contents strewn on the street. Neither Mr. or Mrs. McAllister were arrested.

In October of 1985, about one month after he was released from Castlereigh, the RUC arrested Mr. McAllister for assaulting an officer. As Mr. and Mrs. McAllister described it, they were at Anne Robinson's house when someone came to the door and informed them that the RUC had put Joseph McAllister through a pane glass window and he was badly cut in a house on the next street. Mr. McAllister rushed to the house, which by this time was surrounded by RUC vehicles and officers. Mr. McAllister testified that he entered the house looking for his brother when the RUC stopped him. He could see Joseph lying on the living room floor and tried to inform the officers that he was Joseph's brother. The RUC forcibly removed Mr. McAllister from the scene, with Mr. McAllister evidently resisting the whole way. The RUC officers carried him past Mrs. McAllister, who by this time had arrived at the house, and put him in the back of their vehicle.

Mrs. McAllister testified that when she saw her husband being forcibly removed from the house, she screamed for the RUC officers to be careful with him because of his recent kidney operation. Mr. McAllister testified that he could hear his wife screaming for the RUC to let him go.

The RUC pinned Mr. McAllister to the floor with their boots and allegedly struck him with their rifles. Mrs. McAllister asked the officers if she could accompany Mr. McAllister, and, much to her surprise at the time, they permitted her to join them in the back of the vehicle. Leaving the scene, the officers continued to assault Mr. McAllister despite Mrs. McAllister's protestations. Mrs. McAllister stated that the vehicle had traveled approximately 200 or 300 yards when one officer told another to get rid of her. One of the soldiers then ejected Mrs. McAllister out the back of the vehicle, and it continued on its way to the Donegall Pass RUC barracks. Mrs. McAllister was newly pregnant with her third child at the time.

Once at the barracks, Mr. McAllister continued to resist the officers. He stated that one officer had him in a "necklock" and the other carried his legs in order to get him into the barracks. The officers removed his shoes and put him in a holding cell. Mr. McAllister testified that he continued to complain about the situation and requested medical attention. In response, two officers returned to the cell, roughed him up, and told him to shut his mouth. Several hours later a doctor visited. (See Exhibit 47.) Mr. McAllister testified that he told the doctor that the RUC officers had beat him and also informed him that the bad recently bad part of his kidney removed. The doctor responded that "he would live."

In the meantime, Mrs. McAllister arrived at Donegall Pass and could see her husband's shoes at the front door. She inquired about Mr. McAllister and was informed that he would be detained overnight. At that point she indicated that she wished to press charges against the unit that had assaulted her and her husband in the Land Rover. Since the individual officers did not wear badges, she demanded their names and numbers. The desk officer ignored her request. Shortly thereafter a solicitor hired by Mr. McAllister's mother arrived at the station. He too attempted to get the officers' identifying information, but was also ignored. After repeated requests, the desk officer told the solicitor that he would be removed from the station if he did not leave. Mrs. McAllister testified that with that, four officers forcibly ejected the solicitor from the station, throwing him out n the street "like a piece of garbage." After Mr. McAllister's release the following day, he and his wife returned to file a complaint. This time their efforts were successful, but they later received a letter from the RUC that no action would be taken in response to their complaint.

The RUC charged Mr. McAllister with assaulting a police officer. After a bench trial, the judge found him guilty and ordered him to pay a fine.

In 1986, the RUC raided the McAllister's house and arrested Mr. McAllister in front of his wife and children under the auspices of "investigating terrorism." The RUC took Mr. McAllister to Castlereigh and interrogated him about his activities over the past year and the identities of his current associates. Mr. McAllister testified that the RUC officers never accused him of any specific criminal act, but rather, informed him that they had picked him up because he had been out of prison for a year and they wanted to know what type of activities he was involved in. In an effort to intimidate Mr. McAllister into joining their ranks as an informant, the officers allegedly threatened to tell members of the INLA that he had been providing them with useful information concerning INLA operations. Mr. McAllister testified that he was concerned that he would be "shot dead" if the officers carried out their threat, but nonetheless refused to enter their employ. He was held for three days and released.

Mr. and Mrs. McAllister had two more children — Nicola on July 25, 1986, and Sean on October 12, 1987. (Exhibits 61 and 63.) Mr. McAllister testified that he lived with a constant fear that he and/or his house would be attacked. As a precaution, he placed an iron bar on the back door of his house and pushed the couch across the front door on a nightly basis. On one occasion in September of 1988, he was sleeping when he awoke to the sound of breaking glass. Instinctively, he pushed the wardrobe dresser in front of his bedroom door and then punched through the window in an effort to alert anyone on the street that there was trouble. As it turns out, the McAllister's neighbor had intentionally broken a plane of glass in his own window to gain entry. Having gashed his forearm, Mr. McAllister had to go to the hospital for twenty-one.stitches

On October 1, 1988, Mr. and Mrs. McAllister left for a semi-impromptu vacation to Spain. They had been tentatively planning to take a vacation if the opportunity arose and had lined-up Anne Robinson to take care of their children. On September 30, 1988, Mr. and Mrs. McAllister purchased a week-long vacation package to Spain leaving the next night. As planned, Anne Robinson came to their house to watch the children after Mr. and Mrs. McAllister left for the airport.

Anne Robinson testified that she was at the McAllister's residence with Paul, Nicola, and Sean on the night of Sunday, October 2, 1988. Mark was out of the house playing soccer. At approximately 7:45 p.m., she was downstairs watching television in the 15' x 12' living room when Sean began crying upstairs in his crib. Paul volunteered to check on Sean, and Nicola toddled up the stairs behind him. Mrs. Robinson stated that as the kids reached the top of the stairs, she heard a loud bang and the sound of shattering glass. She thought it was an explosion outside, but soon realized that shots were being fired into the house. Fearing for her grandchildren, she headed toward the stairs at the front of the house, but retreated to the kitchen after seeing the barrel of a gun pointing through the broken front window about ten feet away. She testified that she heard repeated gun shots and then everything went still. The lights had been blown out, and the only sound was water leaking from a damaged radiator.

Mrs. Robinson testified that she attempted to go upstairs, but lost consciousness on her way up. She remembers neighbors coming to assist her and take care of the children. She herself was taken to the Royal Victoria Hospital, where she was treated for shock. Her personal physician then prescribed anti-depressants, which she took for three years.

She testified that the RUC responded to the shooting approximately twenty minutes after it occurred and cordoned off the house for three or four hours. Officers interviewed her and she later learned that twenty-six shots were fired. Despite local media attention, Exhibit 48A), and an investigation by the RUC, no one was charged with the shooting. (Exhibit 49.)

Mrs. Robinson testified that she did not notify Mr. and Mr. McAllister of the shooting while they were in Spain because she felt that there was nothing they could do and she did not want to disrupt their vacation. Mr. and Mrs. McAllister testified that they did not learn of the attack until they returned from Spain. While they were assessing the broken glass in front of their house, their neighbor, Mickey Fitzpatrick, came out and informed them that their house had been "hit" by Loyalists using AK-47s. Thereafter, Mr. and Mrs. McAllister proceeded to Anne Robinson's house five doors down the street to reunite with Robinson, Nicola, and Sean. Paul and Mark were with their paternal grandmother. Mr. and Mrs. McAllister testified that they later returned to the house to assess the damage. However, the McAllister family never returned to live in the house out of fear that the Loyalists would strike again.

Mr. McAllister testified that the RUC never interviewed him about the shooting. He stated that he eventually learned that members of the Red Hand Commandos, a Loyalist paramilitary group, had carried out the attack. While no one was charged with the actual attack itself, the RUC did charge two individuals with possession of Mr. McAllister's security documents. (Exhibit 50.)

Mrs. McAllister described the effect the Loyalist attack bad on her family. She stated that her son Paul was the most troubled and is "in a state of shock." (See Exhibit *56.)* She testified that her own fear is difficult to express in words, but stated that the fear is "deep in [her] soul" and "will never ever leave [her]."

Now homeless, Mr. and Mrs. McAllister decided that it was too dangerous for them to remain together as a family. Therefore, Mr. McAllister went "somewhere safe," Mrs. McAllister took Nicola and Sean to Anne Robinson's house, and Paul and Mark went to live with their aunt. The family continuously moved around out of fear that the Loyalists would find them. After living this way for a while, Mr. McAllister sought the advice of some local priests as to what to do about his situation. He testified that Father Dennis Wilson advised him to leave the country for his own safety.

Mr. and Mrs. McAllister heeded the priest's advice and decided to leave Northern Ireland. They did not view the Irish Republic as a suitable relocation option because they felt that their family could still be reached there. Likewise, they eliminated England, Scotland, and Wales because they had spent their entire lives fighting the British government and feared retribution. The McAllisters ultimately decided to relocate to Toronto, Canada, where Mrs. McAllister's aunt lived. Accordingly, they sold their possessions, and with the financial assistance of some local priests, fled to Canada on December 15, 1988.

Mr. McAllister testified that he and his family requested asylum within one week of arriving in Canada. He stated that finding work in Canada was initially difficult and it took a toll on him personally. He explained that he was depressed and turned to alcohol as a means of self-medication. Around this same time, he was arrested for shoplifting and received a conditional discharge.

Mr. McAllister testified that he regained his composure, stopped abusing alcohol, and found work as a stone mason. He later became a co-owner and partner in a bar called the Rose & Crown in Cambridge, sixty miles west of Toronto. Meanwhile, his asylum application had been summarily denied based on his record of convictions in Northern Ireland. (Exhibit 12.) His family had the benefit of a full hearing on their asylum claim, but suffered the same fate when their applications were denied because Canadian immigration authorities found that they could safely relocate within the United Kingdom. (.Exhibit 107.) The McAllisters appealed the denials of their applications, but fearing ultimate deportation, packed up some belongings and came to the United States on March 6, 1996, before their appeals were adjudicated.

Mrs. McAllister testified that her decision to leave for the United States was prompted by her belief that the entire family would be deported from Canada to Northern Ireland. This was a fate she would not accept. She testified that she feared for her and her children's safety in Northern Ireland. She stated that she had heard that her friend, Theresa Clinton, had been shot twenty-four times and killed during an attack on her house. (S Exhibit 39.) Weeks before the attack, Clinton's husband's security files were reported missing and the RUC told the Clintons to take extra precautions regarding their personal safety. Presumably, Mr. Clinton was the intended target of the attack.

Adding to her fear was the report she received in 1989 that two men on motorcycles returned to 15 Farnham Street looking for her husband. The new occupants of the home, who happened to be Mrs. McAllister's friends, informed her that one of the motorcyclists had his hand in his jacket while the other asked for "Malachy McAllister." Mrs. McAliister speculated that the two men were Loyalists looking to kill Mr. McAllister because they used his full name, rather than his widely used moniker "Mal."

In the United States, Mr. McAllister continued working as a stone mason and started his own business — Antrim Masonry. He testified that he recently entered a new business venture with a partner — H-Block Masonry. He stated that he has been active in his community and has maintained a clean record since arriving on March 6, 1996. In conclusion, Mr. McAllister testified that he supports the current peace process in Northern Ireland, but still fears for his personal safety and the safety of his family if they are returned. He stated that he will be targeted by Loyalist paramilitaries, as well as the RUC. He and Mrs. McAllister both stated that they fear the same treatment if forced to move to England, Scotland, or Wales, because of the pervasive anti-Irish sentiment in the United Kingdom and the fact that Mr. McAllister is a former Republican prisoner.

Mrs. McAllister testified that she tracks current events in Northern Ireland through British Broadcasting Corporation news programs and the Irish press on the Internet. She also speaks to her mother in Northern Ireland on a weekly basis. Like her husband, she too "hopes and prays" that the peace agreement is successful, but fears that major hurdles remain given the continuing accounts of violence in Northern Ireland.

She testified that if her family returns to Northern Ireland, their lives would be "in direct danger." Given the publicity surrounding their case, she fears that the RUC would be waiting for them and may collude with Loyalist paramilitaries by leaking Mr. McAllister's security files. She stated that she fears both the security forces and Loyalist paramilitaries. She feels that despite their twelve year absence, these groups would be determined to harm them because they attempted to flee the country. In addition, she stated that the Loyalists are currently warring amongst themselves, and may soon direct their attention to Catholics in an effort to diffuse their own internal conflicts.

Credibility

An asylum applicant whose persecution claim lacks veracity cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for asylum and withholding of removal. INS v. Stevic, 467 U.S. 407 (1984); see INS v. Cardoza-Fonseca, 480 U.S. *421* (1987). This court recognizes that when assessing an alien's credibility, trivial errors or inconsistencies that are incidental to the underlying asylum claim are not valid grounds on which to rest a negative credibility finding. ac. Martinez-Sanchez v. INS, 794 F.2d 1396, 1400(9th Cir. 1986). However, when the lack of credibility goes to the heart of the alien's claims, or demonstrates that the alien's testimony is altogether dubious, an adverse credibility finding will effectively undermine the alien's testimony. See, Ceballos-Castillo v. INS, 904 F.2d 519 (9th Cir. 1990). Indeed, an alien's adverse credibility precludes him from establishing eligibility for relief. Berroteran-Melendez v. INS, 955 F.2d 1251, 1258 (9th Cir. 1992).

The United States Court of Appeals for the Third Circuit requires that an Immigration Judge have a "legitimate articulable basis" to question an alien's credibility. 3. Chang v INS, 119 F.3d 1055, 1067 (3d Cir. 1997). Moreover, the Court of Appeals has stated that an Immigration Judge who rejects an alien's testimony because it lacks credibility should offer specific, cogent reasons to support such a finding. Senathirajah v. INS, 157 F.3d 210, 216 (3d Cir. 1998).

Having had the opportunity to listen to the respondents' testimony and evaluate each respondents' demeanor, this court is satisfied that each respondent provided believable, consistent, and detailed testimony concerning their claim. Any inconsistencies between the respondents' testimony and their respective affidavits were minor, and are most-likely attributable to the passage of time. Much of the testimony dealt with events occurring more than twenty years ago, and in the case of the children, events that occurred when they were only nine to twelve years old. Each witness, including the respondents, testified openly and candidly, and were responsive to all questions posed. Credibility is simply not an issue in this case.

IV. Charges of Removability

INA 237(a)(1)(B) - (Alien Present in Violation of Law)

INA § 237(a)(1)(B) states: "Any alien who is present in the United States in violation of this Act or any other law of the United States is deportable." Such a charge is appropriate if a nonimmigrant has overstayed his authorized time in the United States. Matter of Siffre, 14 I&N Dec. 444, 445 (BIA 1973). If the alien fails to depart by the imposed deadline, the District Director may properly initiate removal proceedings. The Service must then establish, by "clear, unequivocal, and convincing evidence," Woodby v. iNS, 385 U.S. 276, 286 (1966), that the alien was admitted "as a nonimmigrant for a temporary period, that the period elapsed, and that he [the alien] Matter of Santos, 19 I&N Dec. *105,* 106 (BIAi984); see also Matter of Teberen, 15 I&N Dec. 689, 690 (BIA 1976).

The Service contends that the respondents "remained in the United States for a time longer than permitted." (Exhibits 1A, 40A, 54A, 58A, 60A, 62A.) The respondents have admitted this allegation and have conceded removability on this charge. (Exhibits IA, 40A, 54A, 58A, 60A, 62A.) The respondents' admissions are clear, unequivocal, and convincing, and prove each of the elements of the lodged charge of removability. Woodby, *385* U.S. at 286. As a result, this court sustains the charge and finds the respondents removable pursuant to NA § 237(a)(l)(B).

2. INA 237(a)(1)(A) / INA 212(a)L2)(A](i)(I) - (Alien Convicted for Crime Involving Moral Turpitude)

INA § 237(a)(1)(A) states: "Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable." As a basis for this charge, the

Service asserts that Malachy McAllister was inadmissible under NA § 21 2(a)(2)(A)(i)(I) at the time he entered the United States. Specifically, the Service contends that Mr. McAllister is an alien who was convicted of, or who admits to having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. S. NA § 2 12(a)(2)(A)(i)(I). Believing that his convictions fall within the "purely political offense" exception, Mr. McAllister contests this charge.

"Moral Turpitude" is a concept difficult to define with any degree of precision. But, despite its nebulous nature, the United States Supreme Court has held that the phrase "crime involving moral turpitude" is sufficiently definite to withstand constitutional scrutiny. Jordan v. DeGeorge, 341 U.S. 223, 229-32 *(1951)*. The Board of Immigration Appeals ("Board") has, for its part, sought to create a working definition for distinguishing "crimes involving moral turpitude." The Board has held that crimes involving actions that are "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general" constitute crimes involving moral turpitude. Matter of Lopez-Meza, mt. Dec. 3423 (BIA 1999); see Matter of L-V-C-, Int. Dec. 3382 (BIA 1999). However, evil intent is not a prerequisite for finding that a crime involves moral turpitude. Matter of Lopez-Meza, Interim Decision 3423; see Rodriguez-Herrera v. INS, 52 F.3d 238, 240 (9th Cir. 1995) (noting that the ninth circuit has "held only that without an evil intent, a statute does not necessarily involve moral turpitude")(emphasis added).

In determining whether a crime involves moral turpitude, the statute under which the conviction occurred is controlling. See Matter of Khoum, 21 I&N Dec. 1041, 1044 (BIA 1997). That is, the statute itself must define conduct that necessarily involves moral turpitude without consideration of the individual circumstances under which the crime was actually committed. Matter of Lopez-Meza, Interim Decision 3423. However, when an alien's convictions occur in a foreign country, it is permissible to go beyond the foreign statute and consider any statement of record made by the criminal court in sentencing the alien, or any other facts which may appear from the record of conviction, in order to reach a conclusion as to whether the offense is one which involves moral turpitude under the laws of this country. Matter of S-, 9 I&N Dec. 496,498 (BIA 1961). Whether foreign crimes involve moral turpitude "must be determined in accordance with standards prevailing in the United States." Id at 497.

In the instant case, the Service alleges that two of Mr. McAllister's convictions in Northern Ireland on May 20, 1983, for conspire to murder and unlawful wounding with intent to do grievous bodily harm, are crimes involving moral turpitude. (See Exhibits 6 and 7.) "It is well-established that a conviction on a conspiracy charge does not involve moral turpitude unless the basic crime which was the object of a conspiracy involves moral turpitude." Matter of P-, 5 I&N Dec. *582,* 582 (BIA 1953); Matter of N-, 2 I&N Dec. 201,202 (BIA 1944)("the moral turpitude involved in a conspiracy is derived from the nature of the offense the conspirators agree to commit and not from the conspiracy alone"). As the underlying substantive offense of Mr. McAllister's conspiracy charge, murder must be examined to see if it is a crime involving moral turpitude.

It is well-settled that murder is a crime involving moral turpitude. Matter of LopezAmaro , 20 I&N Dec. 668, 673 (BIA 1 993)("There is no doubt that murder is a crime involving moral turpitude.. .."); Matter of Abi-Rached, 10 I&N Dec. *551,* (BIA 1964)("The crime of voluntary manslaughter is an offense involving moral turpitude.");

Matter of Ghunaim, 15 I&N Dec. 269, 270 (BIA 1975)("Murder and voluntary manslaughter are crimes involving moral turpitude . . ..“). Consequently, a conviction for conspiring to commit murder is likewise a crime involving moral turpitude. Matter of P-, 5 I&N Dec. at 582 (conviction for conspiracy is a crime involving moral turpitude if base offense of conspiracy involves moral turpitude).

Mr. McAllister's second conviction for unlawful wounding with intent to do grievous bodily harm is also a crime involving moral turpitude. The Certificate of Conviction indicates that Mr. McAllister pleaded guilty to the charge that be "unlawfully and maliciously wounded Gregory Conway with intent to do him grievous bodily harm." (Exhibit 6.) Gregory Conway is a police officer with the RUC in Northern Ireland. From the face of the conviction, it is clear that Mr. McAllister had the specific intent to cause grievous bodily harm to Mr. Conway. In addition, Mr. McAllister testified that he, his brother Joseph, and Sean McConkey intentionally set off a burglar alarm knowing that it would draw the security forces into their ambush. When the security forces responded as expected, McConkey shot Constable Conway while Mr. McAllister acted as a look-out. Mr. McAllister testified that the goal was to "take out" Constable Conway. Clearly Mr. McAllister's actions reverberate with depravity, and are contrary to the accepted rules of morality and the duties owed between persons. Matter of Lopez-Meza, Interim Decision 3423.

This court therefore finds that his conviction constitutes a crime involving moral turpitude. Matter of Danesh, 19 I&N Dec. 669, 673 (BIA 1 988)(aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude);

Matter of Medina, 15 I&N Dec. 611, 614 (BIA 1976)(aggravated assault is crime involving moral turpitude); Matter of Goodalle, 12 I&N Dec. 106, 111 ,BIA 1967)(second degree assault requiring willful assault of another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm is crime involving moral turpitude).

Purely Political Offense Exception

Having found both of Mr. McAllister's convictions to be crimes involving moral turpitude, this court must now determine whether either or both fall within the purview of the "purely political offense" exception of INA § 21 2(a)(2)(A)(i)(I). Neither the INA nor the regulations define the term.

The Immigration and Nationality Act of 19528 provided that inadmissibility could not be based on criminal convictions that were "purely political offenses." *5* C. Gordon, S. Mailman & S. Yale-Loehr, Immigration Law and Procedure § 63.03[81[aj[bj at 63-36 (rev. ed. 2000). The legislative history reflects that Congress intended to protect those aliens whose criminal prosecutions were initiated for other than valid reasons. In clarifying the scope of the "purely political offenses" exception, the House of Representatives Managers stated:

> [I]t is the opinion of the conferees that those convictions which were obviously based on trumped-up charges or predicated upon repressive measures against racial, religious or political minorities, should be regarded as purely political in nature and should not result in the exclusion of the alien.

Conf. Rep. No. 82-2096, 82nd Cong., 2d Sess., 1952 U.S.C.C.A.N. *1753*.

Similarly, the U.S. State Department defines "purely political offenses" as delineated in [NA § 212 (a)(2)(i)(I) as including "offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities." 22 CFR § 40.2 1(a)(6). In making a determination of whether a crime is "purely political," the State Department also considers the imposition of a cruel or unusual punishment, or of a punishment which is clearly disproportionate to the offense. U.S. Dept. of State, 9 Foreign Affairs Manual, note 10 to 22 CFR § 40.21(a).

The Foreign Affairs Manual lists the following examples where convictions were considered "purely political" within the meaning of 1NA § 212 (a)(2)(i)(I) and (2)(B):

> (1) An alien who was convicted by a South African court of robbery and assault because the alien helped overpower the guards and forcefully took possession of a government car in attempting to escape from a civilian internment camp.

> (2)An alien convicted by a Netherlands court of having executed false ration coupons to benefit the underground during World War II.

> (3) An alien who was a member of the German SS

---

8. Immigration and Nationality Act of 1952, Pub. L. No. 82-4 14, 66 Stat. 163.

and was sentenced by a Soviet court to nine years for theft of some paper bags.

(4) An alien convicted by a Danish court of forging a receipt for a Danish passport and forging an official request for air transportation solely for the purpose of escaping from an Iron Curtain country.

Id.

Case law on the precise application of the "purely political offenses" exception is limited. The only relevant case addresses a similar concept, but pre-dates the enactment of the Immigration Act of *1952.* In Matter of K-, 4 I&N Dec. 108 (C.O. *1950),* the central office was charged with interpreting a provision in the 1917 Immigration Act providing for an exception to inadmissibility for "persons convicted, or who admit the commission, or who teach or advocate the commission of an offense purely olitical." a at 110. Noting that no courts bad interpreted the meaning of "offense purely political," the central office concluded that "[i]t appears proper, therefore, to consider the construction that has been put upon the meaning of the term "political offenses" appearing in extradition treaties, for which extradition will not be granted." j.. (internal quotations in original). Continuing, the central office discussed varying definitions used in a number of extradition cases dating back to 1891, and alternate definitions proposed by various legal commentators. ç at 110-118. In the end, the central office decided that "in order for an offense to constitute a political one, there must be concerted action for a political purpose." 14. at 118.

While its definition of "offense purely political" is minimally instructive, the notion that it is permissible for courts to look to extradition law when determining the meaning of a political offense exception in the [NA is the true import of Matter of K-. . McMullen v. INS, 788 F.2d *591, 595* (9th Cir. 198 6)(relying on extradition principles in interpreting political exception found. in the immigration law). Indeed, Mr. McAllister offered an expert witness in the field of extradition proceedings.

Political Offense Exception - Extradition Proceedings

Mr. McAllister tendered Dr. Christopher Pyle as an expert on the political offense exception as applied in extradition proceedings. As Dr. Pyle explained, the laws of extradition and immigration are "cousins" and, in the context of the political offense exception, immigration law draws heavily on extradition law. From a review of available case law, it is clear that the concept of a political offense exception has been more fully developed in the extradition context. Indeed, aside from the sources discussed above, there is little authoritative treatment of the political offense exception in removal proceedings from which this court can glean instruction. Therefore, federal extradition case law, and Dr. Pyle's insights into the development and implementation of the political offense exception in extradition proceedings, are useful in determining whether Mr. McAllister's convictions fall within the political offense exception of INA § 21 2(a)(2)(A)(i)(I). Matter of K-, 4 I&N Dec. at 110.

According to federal case law, there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses." Quinn v. Robinson, 783 F.2d 776, 793-94 (9th Cir. 1986); Eain v. Wilkes, 641 F.2d *504,* 512(7th Cir. 1981). "Pure political offenses are acts aimed directly at the government and have none of the elements of ordinary crimes." Quinn, 783 F.2d at 794. Treason, sedition, and espionage are examples of pure political offenses. Id.

Purely political offenses are generally regarded as non-extraditable. See id.

Relative political offenses, on the other hand, are "otherwise common crimes committed in connection with a political act." These offenses are more difficult to define and require heighten- judicial scrutiny. To that end, numerous tests have been developed by courts to ascertain whether a given offense is political. The "incidence test" used by American courts is discussed later in this section. While recognizing the existence of the distinction between "pure" and "relative" political offenses, Dr. Pyle testified that the distinction no longer retains any operative meaning in extradition proceedings.

Dr. Pyle testified that the extradition law of the United States, contained mostly in treaties, generally provides an exception to extradition for individuals who commit otherwise criminal acts in the course of an uprising in an effort to further that uprising. Dr. Pyle provided a thorough history of the exception and commented extensively on the "incidence test" utilized by courts in the United States. e.g, Ouinnv. Robinson, 783 F.2d at 792-8 10 (detailing the development of the political offense exception in extradition proceedings). Likewise, federal courts have discussed the extradition political offense exception *ad nauseam,* thus negating the need for this court to provide a detailed recitation of the history and current state of the exception. Sc,; Barapind v. Reno, No. 99-16668, 2000 WL 1210050(9th Cir. Aug. 28, 2000); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); Eain, 641 F.2d *504;* In Re Extradition of Mackin, 668 F.2d 122 (2d Cir. 1981); In Re Extradition of Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). A brief synopsis, however, is warranted.

"The political offense exception generally prevents a person from being extradited to face prosecution for crimes

committed in furtherance of a political uprising, movement or rebellion in the country in which such occurrences are taking place." Barapind, 2000 WL 1210050 at *3; McMullen, 788 F.2d at 595. The United States adheres to the "incidence test" in determining whether conduct is protected by the political offense exception. The test has a two-fold requirement:
1) there must be an uprising or other violent political disturbance at the time the charged offense was committed, and 2) the charged offense must have been incidental to, in the course of, or in furtherance of the uprising. See Quinn, 783 F.2d at 797 (internal citations and quotations omitted). Dr. Pyle explained that this test is applied neutrally by the American judiciary; it protects both those seeking to overthrow a political regime, as well as those defending an existing political structure. As Dr. Pyle testified, this test reflects the United States's general extradition policy, but extradition between the United States a1 the United Kingdom is specifically governed by treaty.

The central treaty governing U.S. - U.K. extradition is the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Jan. 21, 1977, U.S.-U.K., T.I.A.S. No. 8468 ("Treaty of Extradition"). Article V(1)(c)(i) of this Treaty provides an exception to extradition if "the offense for which extradition is requested is regarded by the requested Party as one of a political character; . . .." Treaty of Extradition, Art. V (l)(c)(i); see also Doherty, 599 F.Supp. at 272-73. This provision is now commonly referred to as the "political exception." However, a more recent supplemental treaty between the United States and the United Kingdom eliminated this political exception provision for certain prescribed criminal acts.

The Supplementary Treaty between the United

States of America and the United Kingdom of Great Britain and Northern Ireland, June *25*, 1985, U.S.-U.K., T.I.A.S. No. 12050 ("Supplemental Treaty") is the most recent pronouncement concerning extradition between the two countries. (Exhibit 101.) It was enacted in response to a series of federal court decisions denying extradition to the United Kingdom based on the political offense exception. In Re Extradition of Smyth, 61 F.3d 711,714(9th Cir. 1995); Barbara Ann Banoff& Christopher H. Pyle, "To Surrender Political Offenders": The Political Offense Exception to Extradition in United States Law, 16 N.Y.U.J. INT'L L. & POL. 169, 179(1 984)(explaining the prevailing fear that judicial application of the political offense exception would transform the United States into a haven for terrorists). The Supplemental Treaty abrogates the political offense exception for specifically enumerated violent offenses (including participation as an accomplice) including, *inter alia*, murder, voluntary manslaughter, and assault causing grievous bodily injury. See Supplemental Treaty, Art. 1(b) and (e); see also Smyth, 61 F.3d at 715; United States v. Kin-Hong, 110 F,3d at 113; In Re Extradition of McMullen, 989 F.2d 603, 608 (2d Cir. 1993).

Analysis

After carefully reviewing the law relating to the political offense exception in both removal and extradition proceedings, this court concludes that Mr. McAllister's offenses do not fall within the purely political offense exception of INA § 212(a)(2)(A)(i)(I). First, it is well-settled that Congress acts intentionally and purposely in the inclusion and exclusion of specific statutory language. INS v. Cardoza-Fonseca, 480 U.S. at 432. By using the term "purely political offense," this court must assume that Congress intended that the exception be interpreted narrowly, encompassing only those crimes falling within the traditional "pure political offense" category. Matter of Hernandez-Puente, 20 I&N Dec. 335, 339 (BIA 1991) (Immigration Judge lacks authority to reject or otherwise pass judgment on the validity of a statute). Neither of Mr. McAllister's offenses qualify. See Quinn, 783 F.2d at 793 (pure political offenses include offenses aimed directly at the government, such as treason, sedition, and espionage). Dr. Pyle's assertion that the distinction between "pure" and "relative" political offenses no longer exists on a practical basis in extradition proceedings does not discount the fact that Congress opted to use the term in the INA. It must be remembered that Dr. Pyle is not an expert on immigration law. Dr. Pyle's testimony does not refute what otherwise appears to be Congress's purposeful use of language. Congress could have used a broader term, such as "political offense," to define the statute's exception. It did not do so.

Second, even if the traditional "pure political offense" distinction is not determinative, Congressional intent and the U.S. State Department's treatment of the purely political offense exception suggests that the defining factor of a "purely political offense" is the motivation of the prosecutor, rather than that of the actor. That is, if charges are trumped-up or fabricated in an effort to intimidate or repress political minorities, any resulting convictions would be deemed "purely political" because the charges were brought solely to further another's political position, rather than out of any sense of enforcing the law or achieving justice. Overzealous prosecution and sentencing also appears to be indicative of a "purely political offense," as in the case of the alien sentenced to nine years for stealing paper bags. See U.S. Dept. of State, 9 Foreign Affairs Manual, note 10 to 22 CFR § 40.21(a). Mr. McAllister's offenses demonstrate a far greater degree of calculated violence and common-law criminality than the examples of "purely political offenses" provided by the State Department. See id.

There is no indication that the charges against Mr. McAllister were trumped up or fabricated.9 Mr. McAllister admitted his involvement in both the conspiracy to murder Ronald Johnson and the premeditated attack on Constable Conway. Additionally, his sentence of seven years for each conviction is not disproportionate to the offenses he committed. Based on this court's review of the available information pertaining to the application of the purely political offense exception in removal proceedings, Mr. McAllister's convictions fall outside of the exception.

Finally, the influence of extradition law does not help Mr. McAllister's cause. Mr. McAllister's own expert witness, Dr. Pyle, testified that, under the provisions of the Supplemental Treaty currently in force, the political offense exception would not be available to Mr. McAllister in extradition proceedings. Mr. McAllister's convictions for conspire to murder and unlawful and malicious wounding with intent to do grievous bodily harm preclude him from qualifying for the political offense exception. Supplemental Treaty, Art. I (b) and (e). Indeed, a review of the federal decisions in this area reveals that Mr. McAllister's only recourse under the Supplemental Treaty would be under Article III (a))(fn10) See Smyth, 61 F.3d at *715* (extradition granted); see also Kin-Hong, 110 F.3d at 114-15 (Article III (a) defense available to alien charged with a crime of violence specified in Article I).

---

9. Indeed, Mr. McAllister only argues that his convictions for various minor offenses in Northern Ireland fit the U.S. State Department definition contained in 22 CFR § 40.2 l(a)(6). Respondent's Summation Brief at 11. He does not assert that his convictions for conspire to murder or unlawful wounding with intent to do grievous bodily harm were fabricated or otherwise politically motivated.

Consequently, even borrowing from extradition law, Mr. McAllister's crimes do not fall under a political offense exception.(fn11)

For the reasons stated above, this court finds that Mr. McAllister's offenses do not fall within the definition of "purely political offenses" found in INA § 212(a)(2)(A)(i)(I) and sustains the INA § 237(a)(1)(A) charge of removability brought by the Service.

---

10. Article III (a) of the Supplemental Treaty states: Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

11. Mr. McAllister's heavy reliance on the application of extradition law is misplaced. See Respondent's Summation Brief at 1-10. While his thorough analysis of his case under extradition law is interesting, Mr. McAllister is not in extradition proceedings. Even if he were, his own expert witness, Dr. Pyle, testified that the political offense exception generally applied in extradition proceedings would not be available to him under the terms of the Supplemental Treaty. (S Exhibit 101.) Mr. McAllister's statement that, "Professor Pyle specifically analyzed Mr. McAllister's convictions and determined that they would be covered by the political offense exception as defined in the extradition law," mischaracterizes Dr. Pyle's actual testimony. Respondent's Summation Brief at 3. In response to a direct question by the Service, Dr. Pyle testified that, under the governing Supplemental Treaty, Mr. McAllister's crimes would be covered by the political offense exception. This court's analysis above is applicable here. Mr. McAllister's convictions do not fall within the realm of the purely political offense exception. Accordingly, since the Service has proved its charge of removability by clear, unequivocal, and convincing evidence, see Woodby, 385 U.S. at 286, this court finds Mr. McAllister removable pursuant to NA § 237(a)(1)(B).

3. INA § 237(a)(1)(A)/ INA § 212(aX2)(B) - (Alien Convicted for Two or More Offenses with an Aggregate Sentence to Confinement of Five Years or More)

INA § 237(a)(1)(A) states: "Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable." As a basis for the second charge under this section, the Service asserts that Malachy McAllister was inadmissible under [NA § 212(a)(2)(B) at the time he entered the United States. INA § 212(a)(2)(B) states:

> Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Mr. McAllister admitted being convicted and sentenced to seven years each for conspire to murder and unlawful and malicious wounding with intent to do grievous bodily harm. In addition, he was convicted of a number of separate offenses for which he also received terms of imprisonment. Exhibit 7.) Mr. McAllister's admissions and the documentary evidence establishes by clear and convincing evidence that Mr. McAllister was convicted for two or more offenses for which the aggregate sentences to confinement were five years or more. (Exhibits 6 and 7.)

The issue, as it was above, is whether Mr. McAllister's offenses fit within the "purely political offenses" exception to the charge of removability. Detecting no difference between the exception contained in NA § 2 12(a)(2)(A)(i)(1) and the exception contained in INA § 2 12(a)(2)(B),

---

4. INA § 237(a)(4)(B) - (Alien Engaged or Has Been Engaged in Terrorist Activity)

INA § 237(a)(4)(B) states: "Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 212(a)(3)(B)(iii)) is deportable." INA § 212(a)(3)(B)(iii) defines the term "engage in terrorist activity." It provides:

> As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.
(II) The gathering of information on potential targets for terrorist activity.
(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.
(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organizations.
(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

INA § 212(a)(3)(B)(iii).

A "terrorist activity," in turn, is defined in NA § 212(a)(3)(B)(ii). It states:

> As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
(III) A violent attack upon an internationally protected person (as defined in section 11 16(b)(4) of title 18, United States Code)(fn12) or upon the liberty of such a person.
(IV) An assassination.
(V) The use of any — (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
(VI) A threat, attempt, or conspiracy to do any of the foregoing.

INA § 212(a)(3)(B)(ii).

Analysis

The above statutory scheme clearly sets forth the analysis one must undertake in deciphering whether a given alien's criminal activities make him an alien who has engaged in terrorist activity. First, there must be an act. Second, the act must constitute a terrorist activity. To make this determination, the conduct itself must be examined in light of the statutory language. The act must be criminal, and in most cases violent. If the commission of a terrorist act is found, it follows a *fortiori* that the alien has engaged in terrorist activity and is therefore removable. However, if these acts occur during the course of a legitimate war, they cannot be deemed terrorist acts.

War

Mr. McAllister contends that the situation in Northern Ireland is a civil war, and therefore, his acts cannot be characterized as "terrorist acts." In support of this contention, Mr. McAllister presented Dr. Richard Falk as an expert in

---

12. Eighteen USC § 11 16(b)(4) reads:
"Internationally protected person" means —
(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

international law and the of war. Through his testimony, and that of Julia Hall, J. Bowyer Bell, and Jack Holland, Mr. McAllister argues that RUC officers were legitimate military targets because they were "co-belligerents" in the Northern Ireland conflict. In addition, Mr. McAllister argues that his convictions cannot be viewed as terrorist acts because no opportunity existed for Catholic Nationalists to pursue their goals by democratic means. Mr. McAllister points to political gerrymandering, restrictions on civil rights, the Special Powers Act, internment without trial, and security force violence as indicators that democratic means were intentionally made unavailable to Catholics by the Protestant establishment. Respondent's Summation Brief at 2 1-28. In addition, he argues that "the laws of war, while binding on the Court as part of customary international law, have only limited relevance here." Id. at 29.

Mr. McAllister's arguments are made in response to the Service's contention that the conflict in Northern Ireland has not risen to the level of a civil war, and therefore, Mr. McAllister's acts should be viewed as terrorist acts, thereby making him removable from the United States. In support of their position, the Service tendered W. Hays Parks as an expert in the laws of war and rules of military engagement.

Mr. Parks testified that the law of war consists of codified agreements between governments detailing rules for war fighting, and in particular, the protection of civilian populations and prisoners of war. The stated goal of the laws of war is to keep the level of extra-military violence during a war to a minimum. Mr. Parks explained that only formal governments have the authority to wage war. Individual citizens, with the exception of a levee en masse (fn13) have no right to engage in an act of war, nor do they have a right to attack their own governments. Citizens engaged in acts of war against their own government are subject to that nation's domestic criminal law. Citizens attacking foreign occupying forces during a war are considered "unprivileged belligerents" - those not authorized to commit acts of war.

Mr. Parks explained that Article III of the four 1949 Geneva Conventions sets forth protections for individuals involved in internal conflicts. The protections are less than those applicable to international conflicts in that it only protects actors from abuse if detained by the opposing forces. These protections only apply if the conflict reaches a level recognized by Article III, usually indicated by statements by governments or interested organizations declaring that Article III protections should apply.

In regard to attacks on police forces, Mr. Parks testified that police officers are considered civilians by treaty and can only be attacked if designated by their country as part of the nation's military. As Mr. Parks explained, a given nation must inform the depository, in this case the government of Switzerland, that its civilian police force, or a department thereof, is now part of its military.

---

13. A "levee en masse" is the right for citizens residing on a nation's border to spontaneously rise up and fight any perceived invasion threat by another country. Once a foreign enemy takes control, however, the citizens no longer have a right, under the laws of war, to rise up against the occupying nation. Mr. Parks testified that the conflict in Northern Ireland is not a "levee en masse."

If such a declaration is not overtly made, civilian police officer conducting domestic law enforcement activities remain civilians and are not considered legitimate military targets.[14]

Finally, Mr. Parks testified that a civil war is a term of art in international law. He described a civil war as a major conflict, just one step below an international war. In his view, civil wars are marked by major uniformed forces, each holding significant areas of territory, engaged in consistent military operations against one another.

Most pertinent to this case was Mr. Parks' testimony concerning Northern Ireland. He stated that not only is the conflict in Northern Ireland not a civil war, but it has not reached the lower level of an Article III conflict. He stated that it is not a civil war because no significant territories are held by the participants. He also stated that it is not an Article III conflict, under the laws of war, because no government or organization has declared it as such. In addition, Mr. Parks stated that the RUC is a civilian police force because it conducts domestic law enforcement duties and Northern Ireland has never designated the RUC as a military body. Its officers are therefore not legitimate targets.

Dr. Richard Falk, the respondents' witness, testified that, in his view, the paramilitaries and the security forces (the British army and the RUC), by their activities, are

---

[14] Mr. Parks testified that only Belgium has ever declared a division of its civilian police department to be part of its military.

"co-belligerents" in the conflict, thereby making the RUC legitimate targets. In his view, the actors in Northern Ireland would not be considered terrorists.

Both Mr. Parks and Dr. Falk indicated that there is a broad spectrum of views concerning the classification of armed conflicts. In weighing each expert's testimony, this court is most persuaded by Mr. Parks' view. His testimony concerning the state of the conflict in Northern Ireland is most consistent with the evidence in this case. According to Mr. Parks, the Northern Ireland conflict is not a civil war, nor is it a conflict serious enough to invoke Article III.[15] In addition, the RUC has continuously acted in a domestic law enforcement capacity and, under the rules of law, is therefore not a legitimate target of paramilitary violence. This court agrees with the Mr. Parks' conclusions and finds that Mr. McAllister's crimes were not committed within the context of a civil war. In addition, this court does not find Mr. McAllister's argument that his violent actions were justified because 4iemocratic channels were closed to Catholics to be persuasive. Accordingly, his actions are not justified by war and must be evaluated to determine whether they constitute terrorist acts.

The Acts

It is uncontroverted that Mr. McAllister has an extensive criminal history. (Exhibit 7.) His most serious convictions, however, occurred on May 20, 1983. On that date, Mr. McAllister pled guilty to the following crimes stemming from his activities with the INLA: 1) conspire to murder, in violation of § 4 of the Offenses Against the Person Act of 186!; 2) unlawful and malicious wounding with intent to do grievous bodily harm, in violation of § 18 of the Offense Against the Person Act of 186!; 3) belonging to the INLA (a proscribed organization), in violation of § 21(1)(a) of the Northern Ireland (Emergency Provisions (Act) of 1978; and 4) five counts of possessing weapons with intent by means thereof to endanger life or cause serious injury to property or to enable any other person by means thereof to endanger life or cause serious injury to property, in violation of Article 17 of the Firearms (Northern Ireland) Order of 1981. (See Exhibit 6.)

---

[15] In his reply brief, Mr. McAllister avers that Common Article III and Optional Protocols I and II have the force of customary international law. Respondent's Summation Brief at 30. However, Mr. Parks testified that the conflict in Northern Ireland has not risen to the level of an Article III conflict, and neither the United States, nor the United Kingdom was a signatory to the Optional Protocols at the time of the alleged incidents. This court does not accept Dr. Falk's view that the customary force of these conventions trumped the fact that neither of the Optional Protocols were ratified.

On October 20, 1983, Mr. McAllister received individual sentences of seven years imprisonment for the conspire to murder, malicious wounding, and two of the firearms charges. He received individual sentences of six years for membership in a proscribed organization and the remaining firearms charges. , The judge ordered each of Mr. McAllister's sentences to run concurrently. See id.

In his direct testimony, Mr. McAllister admitted committing these acts and entering guilty pleas. In addition to his own admissions, documentary evidence proves that Mr. McAllister did indeed commit these acts. (See Exhibits 6, 7, and 28.) Despite Mr. McAllister's arguments concerning the use of "supergrass" evidence against him, the validity of these convictions is not an issue in these proceedings. As this court previously stated, it will not delve behind the face of Mr. McAllister's convictions. (See Special Exhibit 1, "C.")

It is long-standing precedent that an Immigration Judge cannot reach beyond the record of conviction to make a *de novo* decision on the merits of a given conviction. See

Matter of Contreras, 18 I&N Dec. 30, 32 (BLA 1981)(". . . [a conviction is a matter of record and the immigration judge may not go behind it to make an independent determination of guilt or innocence"); accord Matter of Khalik, 17 I&N Dec. *518*, *519* (BIA 1980); Matter of McNaughton, 16 1&N Dec. *569*, 571 (BIA 1978). Further, "under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees." Matter of Linnas, 19 I&N Dec. 302, 310 (BIA 1985)(Board affirmed designation of USSR as country of deportation even though the respondent had been sentenced to death in what appeared to be a sham trial); accord Matter of Awadh, 15 I&N Dec. *775*, 777 (BIA 1976).

The issue, then, is whether any of the above-mentioned criminal acts constitute terrorist activity under INA § 212(a)(3)(B)(ii).

Terrorist Activity

INA § 212(a)(3)(B)(ii) explicitly contains five categories of "terrorist activity." See INA §§212(a)(3XB)(ii)(I)-(V). Sections (I)-(IV) are inapplicable to this case. Thz4ervice contends that Mr. McAllister's criminal acts qualify as terrorist activities under section (V)(b) (use of firearm with intent to endanger the safety of another). The final subsection of 1NA § 212(a)(3)(B)(ii), subsection (VI), provides that the threat, attempt, or conspiracy to commit any of the acts described in subsections (I)-(V) equally qualifies as a terrorist activity.

Mr. McAllister initially argues that his convictions fall under a political offense exception. However, he does not cite or otherwise identify any political offense exception to removability under this section. Respondent's Summation Brief at I (listing various political exceptions contained in other sections of the INA). The only exception in this section of the statute is unrelated to political motive. 1NA § 2 12(a)(3)(B)(ii)(V)(b) contains and exception to the use of firearms with intent to endanger the safety of another when the use of the firearm is for "mere personal monetary gain." INA § 212(a)(3)(B)(ii)(V)(b). Mr. McAllister's argument appears to be based on loose fitting notions that the existence of political exceptions elsewhere in the INA necessitates a finding that a political offense exception implicitly exists for terrorist activities. See at 15-16. Although creative, this argument is not persuasive. This court cannot unilaterally insert an exception into a statutory provision where none exists. See Sale v. Haitian Centers Council. Inc., *509* U.S. 155, 168 (1993)(terms or provisions may not be added where Congress has omitted them); see also Matter of Hernandez-Puente, 20 I&N Dec. at 339.

"Where the language of a statute is clear. . . the unambiguously expressed intent of Congress must be given effect." Matter of Michel, 21 I&N Dec. 1101, 1104 (BIA 1998); see Chevron, U.S.A., Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837, 842-43 (1984). Here, it is clear from a plain reading of the statute that Congress did not provide a statutory political offense exception relating to terrorist activities. The exclusion of such an exception must be recognized by this court, as Congress is presumed to act purposefully and intentionally in its construction of statutes. See Cardoza-Fonseca, 480 U.S. at 432; see also Sale, 509 U.S. at 168. Therefore, since there is no political offense exception, whether Mr. McAllister had a political motive or not is irrelevant in determining whether his acts are "terrorist activities" under this section.

Mr. McAllister's second argument is that "the definition of terrorism in the NA, § 212(a)(3)(B)(ii), is overbroad." Respondent's Summation Brief at 13-15 and 16, n.11. This constitutional argument, however, is inapposite, as this court is without authority to render a decision on the constitutionality of the NA. See Matter of Gonzalez-Camarillo, 21 I&N Dec. 937, 942 (BIA 1997). Having found that no political offense exception exists for terrorist activities, this court will now examine Mr. McAllister's criminal convictions under NA § 212(a)(3)(B)(ii).

Mr. McAllister testified that he was armed with a pistol during the 1981 Rose & Crown ambush on Constable Gregory Conway. His assignment, he stated, was to "protect the shooter," referring to Sean McConkey, the man who actually shot Conway. Mr. McAllister admitted being an active player in this pre-meditated attack. He opened his house to McConkey and Joseph McAllister prior to the shooting and stored the weapons used in the attack. (See Exhibit 28.) The evidence supports, and his testimony confirms, the fact that he knowingly used a firearm with the intent to endanger the safety of another. (Exhibit 6.) Indeed, the statue provision under which he was convicted of unlawful and malicious wounding with intent to cause grievous bodily harm is a specific intent crime. There was no evidence or testimony presented whatsoever to support a claim that Mr. McAllister's involvement was motivated by personal monetary gain. JNA §212(a)(3)(B)(ii)(V)(b). Indeed, he does not assert that it was. Whatever his motivation, Mr. McAllister committed a terrorist act.

Mr. McAllister also testified that he was convicted for conspiring to murder the alleged RUC officer at the QLC. (Se. Exhibit 6.) He testified that after learning of McConkey's plan, he brought McConkey to the QLC so that McConkey could track the suspected RUC officer's movements. Mr. McAllister knew that McConkey intended to "hit" the RUC officer at the QLC, and even stored the weapons to be used in the attack. Later, Mr. McAllister agreed to place a phone call to McConkey to alert him of the RUC officer's presence in the club. Mr. McAllister testified that he in fact placed the call, but McConkey never answered.

He also asserted that if McConkey had answered, he would have told him that the officer was not at the QLC. The fact remains, however, that Mr. McAllister was convicted for conspire to murder for his role in the QLC plan. (S Exhibit 6.) If McConkey had been successful in murdering the alleged RUC officer, it clearly would have been a terrorist act under this section. Conspiring to do so, therefore, is also a terrorist act. See INA § 21 2(a)(3)(B)(ii)(VI).

Accordingly, this court finds that Mr. McAllister committed acts of terrorism within the meaning of INA § 212(a)(3)(B)(ii).

Engaging in Terrorist Activity

Again, INA § 212(a)(3)(B)(iii) defines "engaging in terrorist activity" to mean the commission of an act of terrorist activity as defined by INA § 212(a)(3)(B)(ii). See INA § 212(a) (3)(B)(iii). As the above analysis concludes, Mr. McAllister committed terrorist acts. (Exhibit 6) His activities, as discussed throughout this decision, fall 'within many of the enumerated examples of engaging in terrorist activity provided in INA § 212(a)(3)(B)(iii). NA § 21 2(a)(3)(B)(iii)(I)—(V).

For example, he was clearly actively involved in the preparation and planning of terrorist activity given his involvement in the Rose & Crown ambush and the QLC conspiracy. NA § 21 2(a)(3)(B)(iii)(I). He also gathered information on potential targets for terrorist activity in that he brought Sean McConkey to the QLC as his guest, knowing full-well that the only purpose of the visit was to surveil a potential RUC target. INA § 212(a)(3)(B)(iii)(II). Finally, Mr. McAllister supported actors he knew or had reason to believe either committed or were planning to commit terrorist activity. Mr. McAllister allowed his home to be used as a staging area for the Rose & Crown attack, and kept the attack weapons in his home on the day of the ambush. Likewise, be materially supported Sean McConkey's quest to target the alleged RUC man at the QLC, in that he used his membership privileges to bring McConkey as a guest so that the two of them could gather information about McConkey's intended target. INA § 212(a)(3)(B)(iii)(HI). In short, Mr. McAllister was, at one time, engaged in terrorist activities.

It is important to note the there is absolutely no indication that Mr. McAllister is currently involved in any terrorist activities, or has been involved in any since leaving Northern Ireland. The demonstrated turn-around of his life in a very positive way, however, does not diminish the gravity of his earlier criminal activities.

For the reasons stated above, this court finds that Mr. McAllister has engaged in terrorist activities as defined in 1NA § 21 2(a)(3)(B)(iii), and therefore sustains the [NA § 237(a)(4)(B) charge of removability lodged by the Service.

V. Applications for Relief

A. Malachy McAllister

I. Asylum

a. Statutory Eligibility

Any alien who is physically present in the United States or who arrives in the United States, irrespective of such alien's status, may apply for asylum. See INA § 208(a)(1). An asylum-seeker, however, must be statutorily eligible for asylum. [NA § 208(b)(2)(A) lists six exceptions preventing a grant of asylum. INA § 208(b)(2)(A)(i)-(vi). It states:

> Paragraph (1)[16] shall not apply to an alien if the Attorney General
> determines that —
>
> i)the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
> (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
> (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
> (v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 21 2(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section

---

[16] Paragraph (1) reads:

> The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section l01 (a)(42)(A).

INA § 208(b)(l).

> 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
> (vi) the alien was firmly resettled in another country prior to arriving in the United States.

INA § 208(b)(2)(A).

b. Analysis

INA § 208(b)(2)(A)(ii) - Particularly Serious Crime

Asylum is not available if the Attorney General determines that the alien has been convicted by a final judgment of a particularly serious crime, thereby constituting a danger to the community of the United States. See [NA § 208(b)(2)(A)(ii).

In making a determination as to whether a given crime is particularly serious, the Immigration Judge must consider the individual facts and circumstances of the case. Matter of S-S-, Interim Decision 3374 (BIA 1999). The Board has stated that factors such as the nature of the conviction, type of crime committed, sentence imposed, circumstances and underlying facts of the conviction, and the existence of aggravating factors, are relevant in determining whether a crime is particularly serious. j Matter of L-S-, Interim Decision 3386 (BIA 1999); Matter of L-S-J-, 21 1&N Dec. 973 (BIA 1997). Once a determination is made that the alien has been convicted of a particularly serious crime, dangerousness is imputed to the alien and no independent examination of dangerousness is necessary. $ Matter of L-S-, Interim Decision 3386; see Matter of Carballe, 19 I&N Dec. 357, 360-61 (BIA 1996); Matter of O-T-M-T-, 21 I&N Dec. 639 (BLA 1996).

Applying the factors mentioned above, this court finds that Mr. McAllister has been convicted by a final judgment of a particularly serious crime. As discussed at length in this decision, Mr. McAllister was convicted of conspire to murder, unlawful and malicious wounding with intent to cause grievous bodily harm, and numerous counts of possession of weapons with intent to endanger the life of another. (Scc Exhibit 6.) The court sentenced Mr. McAllister to concurrent terms of either seven or six years for each of his convictions. jj This court cannot look behind the face of these convictions to test their validity, Matter of L-S-, Interim Decision 3386, but must accept them as presented. Based on the nature of the crimes and the sentences imposed, Mr. McAllister's crimes are clearly particularly serious. Matter of A-A-, 20 I&N Dec. *492,505* (BIA 1992) (murder is a particularly serious crime); Matter of S-S-, Interim Decision 3374 (Sentence of 55 months for armed robbery deemed particularly serious crime).

Moreover, examining the circumstances and underlying facts of the convictions reinforces this court's conclusion that Mr. McAllister's crimes were particularly serious. Mr. McAllister intentionally and voluntarily participated in activities which he knew would likely cause the death or serious wounding of another. He testified that he and Sean McConkey intended to "take out" Constable Conway. He was armed in the pre-meditated ambush (aggravating factors) and was prepared, as he put it, to "protect the shooter." He also admitted being actively involved in the plot to murder the alleged RUC officer at the QLC. Despite his attempts to minimize his role, it is clear that he brought McConkey to the QLC with the purpose of observing the alleged RUC officer as a potential murder target. He also agreed to telephone McConkey with the alleged RUC officer's location so that the "hit" could be carried out. Mr. McAllister's demonstrated willingness to further murder plots and brandish firearms leads this court to the only reasonable conclusion: Mr.' McAllister's convictions were for particularly serious crimes. He is therefore statutorily barred from asylum pursuant to INA § 208(b)(2)(A)(ii).

INA 208(b)(2)(A)(iii) - Commission of a serious nonpolitical crime

INA § 208(b)(2)(A)(iii) provides that asylum shall not be granted if "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside of the United States prior to the arrival of the alien in the United States."

In this case, there is no issue as to whether there are "serious reasons for believing" because Mr. McAllister has admitted, and the documentary evidence confirms, that he was convicted of conspire to murder and unlawful and malicious wounding with intent to cause grievous bodily harm. (c Exhibit 6.) Therefore, the only issue is whether Mr. McAllister's convictions are 1) serious, and 2) nonpolitical.

Seriousness

Determinations of seriousness are made on a case-by-case basis. See Matter of RodriguezPalma , 17 I&N Dec. *465,* 469 (BIA 1980). In Matter of Ballester-Garcia, the Board discussed the factors relevant to an examination of whether a given crime is serious for purposes of INA 208(b)(2)(A)(iii). S. Matter of Ballester-Garcia, 17 I&N Dec. 592, 595 (BIA 1980). It stated:

> [I]n a case . . . where there is no doubt that a crime has been committed, we look to the facts.. . to determine whether there are serious reasons to consider that the crime committed was a "serious" one. Where a crime such as

> murder or armed robbery is at issue, we are unlikely to have much trouble in making this determination.... [S]uch factors as the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of any property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States, are all proper considerations in attempting to decide whether or not a crime may have been serious.

Id.

Having already discussed the seriousness of Mr. McAllister's convictions in determining that his convictions for conspire to murder and unlawful and malicious wounding are crimes involving moral turpitude constituting terrorist acts within the meaning of that term under the INA, this court has no difficulty finding that these crimes are also "serious" for the purposes of INA § 208(b)(2)(A)(iii). The salient issue is whether they are "nonpolitical crimes."

Nonpolitical Crimes

"Whether crimes are of a political character is primarily a question of fact." Matter of McMullen, 19 I&N Dec.90, 97 (BIA 1984)(citing Omelas v. Ruiz, 161 U.S. 502 (1896)). In Matter of McMullen, the Board set forth the following standard for determining the political nature of a crime:

> In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This

> would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.

Matter of McMullen, 19 I&N Dec. at 97-98. The U.S. Supreme Court upheld the Board's interpretation and mode of analysis for determining whether a crime is a "serious nonpolitical crime." See INS v. Aguirre-Aguirre, 526 U.S. 415 (1999). Citing principles of deference annunciated in Chevron, 467 U.S. at 837, it rejected arguments (and the Ninth Circuit Court of Appeals' decision) that this test requires supplementation. id at 424.

Given the exhaustive analysis of Mr. McAllister's crimes above, this court need not labor with another recitation. This court finds that Mr. McAllister's convictions for conspire to murder and unlawful and malicious wounding with intent to cause grievous harm are "nonpolitical crimes." Both of Mr. McAllister's convictions consisted of premeditated attacks on individuals he and his accomplices believed were members of the Northern Ireland civilian police force — the RUC. Mr. McAllister candidly admitted his involvement in each of these plots designed to kill the respective targets. Whether Mr. McAllister perceived these individuals as military targets is irrelevant since, even if they were, this court does not view conspire to murder and intentional malicious wounding to be crimes whose political aspects outweigh their common-law character. Both acts, even though not followed through to fruition, were atrocious in nature and grossly out of proportion to any political objective Mr. McAllister may have had. "Atrocity," as defined in Black's, is "a word implying conduct that is outrageously or wantonly wicked, criminal, vile, cruel; extremely horrible and shocking." BLACK'S LAW DICTONARY', *125* (6th ed. 1990). This court finds that this definition aptly describes Mr. McAllister's actions. Accordingly, this court finds that there are serious reasons for believing that Mr. McAllister committed serious nonpolitical crimes outside of the United States prior to his arrival here. He is therefore statutorily barred from asylum pursuant to [NA § 208(b)(2)(A)(iii).

INA § 208(b)(2)(A)(v) - Removable under [NA § 237(a)(4)(B)

INA § 208(b)(2)(A)(v) provides that asylum shall not be granted if:

> the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 2 12(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States...

Id. (emphasis added).

As stated above, this court finds that Mr. McAllister is removable under INA § 237(a)(4)(B). Accordingly, be is also statutorily ineligible for asylum pursuant to INA § 208(b)(2)(A)(v).

2. Withholding of Removal

a. Statutory Eligibility

Withholding of removal prevents removal to a given country if an alien can demonstrate that his life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion. [NA §241(b)(3)(A). Similar to those applicable to asylum, there are exceptions barring a grant of withholding of removal.

The statute reads: Subparagraph (A)[17] does not apply to an alien deportable under section 237(a4)(D) or if the Attorney General decides that --

> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;
> (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or
> (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

---

[17] Subparagraph (A) provides:
Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion-

INA § 241(b)(3)(A

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

INA § 241(b)(3)(B).

b. Analysis

INA 241(b)(3)(B)(ii) - Particularly Serious Crime

As indicated above in this court's asylum eligibility analysis, this court finds that Mr. McAllister has been convicted by a final judgment of a particularly serious crime. He is therefore statutorily barred from withholding of removal by 1NA § 24 l(b)(3)(B)(ii).

INA 241(b(3)(B)(iii) - Commission of a serious non-political crime

As indicated above, this court finds that there are serious reasons to believe that Mr. McAllister has committed a serious nonpolitical crime outside of the United States before he arrived in this country. He is therefore statutorily precluded from withholding of removal under INA § 241(b)(3)(B)(iii).

INA 241(b)(3XB)(iv) - Danger to the Security of the United States

INA § 241(b)(3)(B) states: "For purposes of clause (iv) [danger to security of the United States], an alien who is described in section 237(a)(4)(B) Jll be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." (Emphasis added.) Having found that Mr. McAllister is removable pursuant to NA § 237(a)(4)(B), this court is compelled by law to find that there are reasonable grounds to believe that Mr. McAllister is a danger to the security of the United States. [NA § 241(b)(3)(B). He is therefore ineligible for withholding of removal pursuant to NA § 241 (b)(3)(B)(iv).

3. Torture Convention Relief— Withholding and Deferral of Removal

a. Law

In order to receive relief under the Torture Convention, an alien must prove that it is more likely than not that he would be tortured if removed to the proposed country of removal. S 8 CFR § 208.16(c)(2) (2000). Torture is defined as:

> inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain

> or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 CFR § 208.1 8(a)(1). However, punishment stemming from lawful criminal prosecutions is not considered torture. For example:

> Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

8 CFR § 208.18(a)(3).

The alien must show that the persecutor had the specific intent to torture, see 8 CFR § 208.18(a)(l) and (5), and that the torturous act resulted in pain and suffering. 8 CFR § 208.18(a)(l). The alien can satisfy the burden of proof through his o credible testimony without corroboration. See 8 CFR 208.16(c)(2). An alien who successfully establishes a claim under the Torture Convention is protected from removal to the country where the torture occurred.

An alien deemed entitled to protection under the Torture Convention will be granted withholding of removal, unless the alien is subject to mandatory denial under 8 CFR § 208.16(d)(2). Eight CFR § 208.16(d)(2) provides that an application for withholding of removal under the Torture

Convention in removal proceedings shall be denied if the applicant falls under INA § 241(b)(3)(B). In that case, the alien is granted deferral of removal pursuant to 8 CFR § 208.17(a).

In that case, the alien is granted deferral of removal pursuant to 8 CFR § 208.17(a). Recently, in Matter of S-V-, Interim Decision 3430 (BIA 2000), the Board discussed the requirements of the Torture Convention. Noting that an alien need not show that he will be tortured on account of a particular belief or immutable characteristic, the Board reiterated that an alien must show that the harm will be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity." jj (quoting 8 CFR § 208.18(a)(I)). Acquiescence to torture "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 CFR § 208.18(a)(7). Both actual knowledge and "willful blindness" fall within the definition of acquiescence. $. Matter of S-V-, Interim Decision 3430. To demonstrate acquiescence by government officials, the alien "must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it." Id. The alien must establish that the government officials are willfully accepting the persecutor's torturous activities. See Id.

b. Analysis

Because this court finds that Mr. McAllister is statutorily ineligible for withholding of removal under INA § 241 (b)(3)(B), Mr. McAllister is barred from receiving withholding of removal under the Torture Convention.[18] Sçç

18

18. On page 67 of his Summation Brief, Mr. McAllister cites an oral order

8 CFR § 208.16(d)(2). He is, however, entitled to deferral of removal if this court finds that it is more probable than not that he will be tortured if returned to Northern Ireland. See 8 CFR § 208.16(c)(2).

Mr. McAllister clearly has not met his burden of proving that it is more likely than not that he will be tortured if returned to Northern Ireland. To do so, he would hive had to prove that torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity." Matter of S-V-, Interim Decision 3430. There is simply no support in the record for the proposition that the governments of either Northern Ireland or the United Kingdom would torture Mr. McAllister upon his return to Northern Ireland. He has not described any specific treatment that he fears he would be subjected to by either government that meets the definition of torture. See 8 CFR § 208.18(a)(l).

Moreover, any fear that Mr. McAllister has of being tortured by Loyalist paramilitary groups is not covered by the Torture Convention. Matter of S-V-, Interim Decision 3430. Mr. McAllister's feared torture must be inflicted or acquiesced to by the government. jj From all accounts, the government is attempting to control these Loyalist paramilitary groups, and there is no evidence that it acquiesces in their activities. Evidence of current collusion

---

of this court for the proposition that: "Malachy McAllister is not disqualified from eligibility for withholding of removal under the CAT because none of his convictions is for a "particularly serious crime," as he can no longer, as of September 30, 2000, be considered an "aggravated felon." Mr. McAllister misunderstands this order. This court's oral order was limited to Mr. McAllister's ability to apply for asylum. Recognizing that as of September 30, 2000, the aggravated felony bar would no longer apply, this court permitted Mr. McAllister to present his asylum case. At no time did this court rule that because he is no longer considered an aggravated felon, "none of his convictions is for a 'particularly serious crime." This statement is indeed contrary to law.

between the government and Loyalist paramilitaries is inconclusive as to a definite pattern of cooperation. Whatever evidence there is of collusion is simply not enough to carry Mr. McAllister's burden of proving that it is more probable than not that he will be tortured.

This court finds that Mr. McAllister has not met his burden of proving that it is more likely than not that he will be tortured by or with the acquiescence of the Northern Ireland or United Kingdom governments if he is returned to Northern Ireland. His application for deferral of removal will therefore be denied.

4. Voluntary Departure

INA § 240(B)(b)(l) provides that:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that -
>
> (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4);

As stated above, this court finds Mr. McAllister removable pursuant to INA § 237(a)(4)(B). He is therefore statutorily ineligible for voluntary departure and his application will be denied. INA § 240(B)(b)(l)(C).

B. Sarah. Nicola. and Sean McAllister[19]

1. Asylum

a. Law

An alien requesting asylum relief pursuant to INA § 208 bears the evidentiary burden of proof and persuasion. 8 CFR § 208.13(a). It is "incumbent upon an alien to establish the facts supporting his claim [of asylum] by a preponderance of the evidence." Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985).

To be granted asylum, an alien must first establish that he is a refugee within the meaning of INA §l01(a)(42)(A). A refugee is defined as any person who is unable or unwilling to return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA §l01(a)(42)(A). Human rights violations that are not based on one of the five enumerated grounds do not constitute a basis for asylum relief. S INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); Matter of T-, 20 I&N Dec. 571, 577 (BIA 1992). However, that is not to say that an alien must specifically allege a violation by name, but rather, must set forth a factual scenario implicating one of these five grounds. Chang v. INS, 119 F.3d at 1063 n.4 (finding it unnecessary to use the word "political" in a claim for asylum based on facts alleging political persecution).

---

[19] Since Nicola and Sean are riding on their mother's asylum application and were only small children in Northern Ireland, this court will refer only to Mrs. McAllister in this portion of the decision

To establish a well-founded fear of persecution, an alien must assert facts that evince the following: (1) that the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it; (2) that a persecutor is aware or could become aware that the alien possesses this characteristic; (3) that a persecutor has the capability of punishing the alien; (4) and that a persecutor has the inclination to punish the alien. Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BL& 1987) (modifying Matter of Acosta, 19 I&N Dec. at 229, by changing the second requirement to read "could become aware of. . ." rather than the harsher standard of "could easily become aware. . ."). A well-founded fear of persecution may be established upon a lesser showing than the clear probability of persecution standard applicable for withholding of removal. See j v. Cardoza-Fonseca, 480 U.S. at 449. If an applicant for asylum establishes that a reasonable person in like circumstances would fear such persecution, then the alien has sufficiently demonstrated a well-founded fear. Matter of Mogharrabi, 19 I&N Dec. at 445.

When adjudicating an alien's asylum claim, "it is necessary to assess the credibility and the probative force of the evidence put forward by the alien." Matter of Acosta, 19 I&N Dec. at 216. The alien's subjective mental state must be considered against the backdrop of circumstances prevailing in the alien's home country. The objective reasonableness of the alien's fear can be based on what has happened to others similarly situated, as reported in the Department of State Country Reports on Human Rights Practices or other reliable sources. See Matter of Exame, 18 I&N Dec. 303, 304-5 (BLA 1982)(holding that it is error for an Immigration Judge not to admit background material presented by the alien into evidence). In cases where the only available evidence of the alien's subjective fear is his own testimony, such testimony may suffice if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fears. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989). This does not mean that introducing supporting evidence is at the alien's option. Generally such evidence should be presented when available. This is particularly true when the alien's asylum claim rests on allegations of general conditions in his or her home country. See j4 at 125. In such cases, corroborative background evidence may well be essential. Matter of S-M-J-, 21 I&N Dec. 722, 724 (BIA 1997).

Alternatively, eligibility for asylum may be established by a showing of past persecution based on any one of the five enumerated grounds. 8 CFR § 208.13(b)(1); Matter of Chen, 20 I&N Dec. 16, 18(BIA 1989). The Board of Immigration Appeals has held that where past persecution is established, there is a presumption that the alien has reason to fear future persecution. See id.; see Matter *of H,* 21 I&N Dec. 337 (BIA 1996). This presumption maybe rebutted if the evidence reveals that country conditions have changed so much that there is little likelihood of present or future persecution. S Matter of H-, 21 I&N Dec. at 346. However, even if the presumption is successfully rebutted, it is not a *per se* bar to a discretionary grant of asylum. Matter of Chen, 20 I&N Dec. at 19 (asylum may be granted where there is little threat of future persecution).

Finally, a grant of asylum pursuant to INA § 208 is discretionary. $. INS v. Stevic, 467 U.S. at 423 n.18; see Matter of Acosta, 19 I&N Dec. at 218. Therefore, in addition to establishing statutory eligibility, the alien also has the burden of establishing that the favorable exercise of discretion is warranted. See Matter of Shirdel, 19 I&N Dec. 33,38 (BIA 1984). To meet this burden, the alien must present evidence of truthful, positive factors that he believes will support the favorable exercise of discretion. $. Matter of Acosta, 19 I&N Dec at 214. Absent any adverse factors, asylum should be granted in the exercise of discretion if the alien is otherwise eligible. Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987).

b. Analysis

Past Persecution

Eligibility for asylum may be established by a showing of past persecution based on any one of the five enumerated grounds. 8 CFR § 208. 13(b)(1); see Matter of Chen, 20 I&N Dec. at 18. Persecution is not specifically defined by the INA or immigration case law. By its nature, the concept has developed on a case-by-case basis. The term "persecution" has come to encompass a broad spectrum of treatment, ranging from the most egregious violations of human rights, such as torture and threats to life or freedom, to physical abuse and even non-physical harm. g. Stevic, 467 U.S. at 428 (persecution is a "seemingly broader concept than threats to life or freedom"); Balzoski v. INS, 932 F.2d 6io, 642(7th Cir. 199 1)(persecution covers nb-life threatening violence and physical abuse); Matter of Laipenieks, 18 I&N Dec. 433, 457 (BIA 1 983)(harm or suffering need not be physical to constitute persecution).

Additionally, persecution need not be contained in a single event. While a single incident may, in and of itself constitute persecution, the cumulative effect of several incidents may also amount to persecution. Sing v. INS, 94 F.3d 1353, 1358(9th Cir. 1996); see Matter of OZL & I-Z-, Interim Decision 3346 (BIA 1998). Likewise, intense discrimination sustained over a long period of time may also amount to persecution. United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, ¶ *54-55* (1988).

Pursuant to 8 CFR § 208.13(b)(1)(i), an alien who establishes past persecution is presumed to have also demonstrated a well-founded fear of future persecution. Matter of H-, 21 I&N Dec. at 346. However, even absent a showing of a well-founded fear of future persecution, past persecution alone is a valid basis for granting asylum. Matter of S-A-, Interim Decision 3433 (BIA 2000); Matter of H-, 21 I&N Dec. at 346 (an alien who demonstrates past persecution is not separately required to demonstrate compelling reasons for being unwilling to return to his or her country in order to be granted asylum). And that persecution need not be by or at the acquiescence of the government. Matter of S-A-, Interim Decision 3433 (concluding that Moroccan woman with liberal Muslim beliefs had suffered past persecution at the hands of her conservative orthodox Muslim father on account of her religion).

An alien demonstrating past persecution must also demonstrate that the past persecution was inflicted "on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). "An asylum applicant is not obliged, however, to show conclusively why persecution has occurred." Matter of S-A-, Interim Decision 3433.

After carefully reviewing the evidence in this case, it is clear to this court that Mrs. McAllister has suffered extreme past persecution based on her religion, her political opinion, and because she is Malachy McAllister's wife. Gebremichael V. INS, 10 F.3d 28 (1st Cir. 1993) (recognizing persecution based on family membership as a basis for asylum). The evidence reveals that Mrs. McAllister was persecuted in a number of ways. As Catholics, she and her family lived in squalor and suffered severe discrimination on account of their religious beliefs. As a teenager and young adult, Mrs. McAllister was targeted for persecution based not only on her religion, but also on her Nationalist political views. Later, she and her family were persecuted because they were Mr. McAllister's family. jj She suffered a constant campaign of harassment, endured public humiliation, witnessed the persecution of her family members, and was physically abused. This pattern of persecution culminated with an attempt on her and her family's lives when masked gunmen attacked her home. Each incident of persecution was carried out by either the Northern Ireland or British governments, or Protestant/Loyalist paramilitary groups, which the governments were unable or unwilling to control. Individually, the major acts of persecution discussed below, especially that attack on Mrs. McAllister and her family, constitute past persecution. But, the acts of persecution viewed in the aggregate provide overwhelming evidence of severe past persecution. See Sing, 94 F.3d at 1358;' Matter of O-Z- & I-Z-, Interim Decision 3346.

Discrimination

The disparate treatment of Catholics and Protestants in Northern Ireland is a historical fact. Each of the witnesses in this case, but especially J. Bowyer Bell, Paul Wilkinson, and Jack Holland, testified that Catholics, as the minority, were heavily discriminated against in a variety of ways. Housing, employment and voting rights were the most notorious arenas in which Catholics were discriminated against. Their testimony is bolstered by the documentary evidence chronicling the pervasive pattern of discrimination. (Exhibits 31, 71, Tab A, and 75, Tab N.) Most pertinent, however, is Mrs. McAllister's own testimony detailing the specific acts of discrimination she endured.

Mrs. McAllister testified that she and her family lived in a "shack." She stated that they lived on the first floor of the government-owned home they rented, while another Catholic family lived in the bedrooms on the second floor. As she explained, the house did not have indoor plumbing and was in a desperate state of disrepair. In her view, her house, and the houses in her Catholic area needed to be razed and rebuilt, as was done with aging Protestant homes. This however, was not the practice. Mrs. McAllister testified that the homes in the Catholic areas were not razed and rebuilt as they were in the Protestant areas. Instead, the Housing Authority came in and performed minimal cosmetic repairs, such as installing new windows and doors. The major structural defects, however, were left unrepaired.

Along with the disparate housing conditions, both Mr. and Mrs. McAllister testified about employment and voting discrimination. Mr. McAllister testified that he was intimidated into leaving his first job as a tire-fitter after being warned by a group of Protestants that he would be shot because he was taking a job opportunity away from a Protestant. Mrs. McAllister stated that it was difficult for Catholics to find work because Protestants owned or controlled most of the businesses and would not employ Catholics. (Exhibit 43.) Indeed, the expert witnesses testified that Catholic unemployment rates have traditionally been higher than Protestant rates.

Mrs. McAllister also testified that Catholics were effectively shut out of the political process because voting rights were tied to property ownership. She stated that "voting was limited to ratepayers — which meant homeowners." (Exhibit 43.) Since very few Catholics owned their own homes, voting rights, as a practical matter, were severely restricted. In addition, political gerrymandering was used to ensure Catholic minorities in voting districts, thus negating any voting rights Catholics did enjoy. Exhibit 43.)

Mrs. McAllister testified that she was cognizant of and later participated in civil rights protests concerning housing, employment, and voting discrimination. She testified that her very first memory of political violence concerns an incident when she was walking home from school and observed women and children peacefully conducting a civil rights protest by sitting on kitchen chairs and blocking the road. It was, however, the RUC's violent response that triggers this memory. Mrs. McAllister testified that the RUC physically and violently swept the protesters out of the street. She testified that she saw RUC officers beating and abusing these women and children.

More directly, Mrs. McAllister was personally involved in a peaceful march down the Lower Ormeau Road in protest of discrimination against Catholics. She testified that she and thousands of other Catholics were attacked by Protestants throwing stones, bottles, and bricks when the march reached the Donegall Pass. Despite their strong presence and duty to protect the march participant, Mrs. McAllister testified that the RUC stood by and did nothing to prevent the attack or otherwise stop the Protestants.

From a review of the record, it is apparent that discrimination against Catholics in Northern Ireland was systemic. While in and of itself the above-described discrimination may not constitute past persecution, it is only a small part of the persecution Mrs. McAllister endured in Northern Ireland, and must be viewed in conjunction with the other acts described below.

Harassment

Harassment has been recognized as a relevant factor to be considered in determining past persecution. Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992). The evidence in this case makes very clear that Mrs. McAllister was subject to a constant campaign of harassment on two fronts: 1) from Protestants/Loyalists, who the government was unwilling or unable to control, and 2) from RUC officers and British soldiers.

Protestants/Loyalists

Ongoing fighting between the Protestant and Catholic populations of Northern Ireland is undeniable. Protestant violence, however, is somewhat insulated from prosecution. This may be due to the fact that the security forces perceive Protestants/Loyalists to be "on their team" because politically they strive for continued British control over Northern Ireland, and the Catholics, conversely, wish to rid themselves of British dominance. Whatever the reason, the evidence bears out the fact that Protestant violence directed at Catholics occurred with at least some degree of impunity.

Each of the McAllisters testified that they had constant run-ins with Protestants. All of them, including Paul and Mark, testified that daily attendance at school was preceded by bottle-throwing and verbal assaults between themselves and Protestant youths. Mr. and Mrs. McAllister testified that the Lower Ormeau Road was surrounded by Protestant neighborhoods and to get to school or work, the McAllisters and their children had to cross through these hostile areas.

In addition to the incident when Mrs. McAllister was attacked by Protestants as she marched with other Catholics by Donegall Pass, Mrs. McAllister was subjected to other acts of Protestant/Loyalist violence. She testified that Catholic youths living on the Lower Ormeau Road had little by way of entertainment facilities. As a result, many of the teens frequented a club further up the Ormeau Road. To get here, however, the teens bad to pass through Protestant area. On one evening when Mrs. McAllister and a group of her friends were returning through the Protestant area from this club, a man, who Mrs. McAllister believed to be a Protestant, jumped out of the bushes and opened fire on the young women with a pellet gun. Mrs. McAllister testified that, at the time, she was terrified because she thought this man was shooting at them with a reel gun. She hid in the bushes and remained unharmed. Her friend, however, did not fare as well. She was shot square in the face. This would not be the only time Mrs. McAllister would witness Protestant/Loyalist violence.

In early 1972, Mrs. McAllister was playing outside with her friend Muriel Walker, when a group of suspected UVF members pulled up in a car in front of the house and murdered Muriel's father, Mervin. Both girls witnessed the cold-blooded drive-by murder. Mrs. McAllister stated that she heard gunshots and ran for cover. (Exhibit 43.) She next heard Muriel's mother screaming, and saw Walker's body on the ground. (Exhibit 43.) Three years later, in June of 1975, Michelle O'Connor, a three year old neighborhood girl whom Mrs. McAllister had babysat and was particularly close with, was killed when her father's bobby-trapped car exploded with her sitting in the back seat. Mrs. McAllister stated that the attack was carried out "solely because the O'Connors were Catholic." ($. Exhibit 43.) Again, the UVF claimed the attack. In 1974, the UVF bombed the Rose & Crown Pub, a popular Nationalist gathering spot. Both Mr. and Mrs. McAllister testified that they knew people who died in the attack.

On another occasion, in 1975, Mrs. McAllister was visiting her friend Angela Gallagher at the liquor store where Gallagher worked when a gunman stormed into the store, separated the women, and shot Gallagher in the legs. When Mrs. McAllister ran to a nearby pharmacy and pleaded for help, the Protestant pharmacist told her she'd have to wait until he was through assisting his customers. Mrs. McAllister testified that she believed he would not call help immediately because he knew she was Catholic. The two women were later taken to the hospital, where Mrs. McAllister was treated for shock.

It is clear from the sheer number of attacks that the British soldiers and the RUC were either unwilling or unable to control these Loyalist paramilitary groups. As a prime example, Mrs. McAllister testified about the details of Noel Beckett's death. Noel Beckett was a Catholic schoolmate of Mr. McAllister's. One night in 1975, a carload of Loyalists entered a Catholic area with the intention of kidnapping a Catholic. Mr. and Mrs. McAllister happened to be in this area at the time. Catholics in the area identified the suspicious car, and the Loyalists' kidnapping plan was foiled. However, one of the Loyalists somehow was ejected from the car and was beaten by the Catholics. In response, the car sped up and down the sidewalk crowded with Catholics trying to recover their associate. Mrs. McAllister testified that she could see "bodies flying into the air" as the car struck Catholic after Catholic. Noel Beckett, in the wrong place at the wrong time, was struck and killed.

Importantly, Mr. and Mrs. McAllister both testified that there was a joint RUC/British Army checkpoint nearby, but not one officer responded to the commotion which lasted approximately twenty to thirty minutes. This obvious willful blindness to, at the very clearly criminal activity on the part of the Loyalists, is just one example of the RUC's and British army's unwillingness or inability to control the violence directed at Catholics. Matter of Kasin, 21 I&N Dec. *357, 365* (BIA 1996); see also Matter of Acosta, 19 I&N Dec. at 222-23.

RUC and British Soldiers

The evidence in this case establishes that the RUC and British army have engaged in a campaign of harassment against Nationalist Catholics. This routine harassment went well-beyond legitimate law enforcement activities. (Exhibit 72, Tab D, *5.)* The security forces engaged in repeated street interrogations of Catholic/Nationalist individuals on a daily basis. The testimony in this case indicated that these stops could last anywhere from five to forty-five minutes, and could occur upwards of three or four times per day depending on the individual. Both Mr. and Mrs. McAllister testified that not a week went by without them being stopped at least once in this manner. Mr. and Mrs. McAllister, and other witnesses in this case, testified that these encounters generally involved the security forces asking the individual for his/her name, address, and destination. If all went well, the patrol would do a radio check and release the individual. If not, verbal and/or physical abuse and arrest were not uncommon. These incidents of interrogation caused mental (and often physical) distress, and fostered feelings of fear, isolation, and anxiety in the Nationalist/Catholic community. (Exhibits 72, Tab D, *5,* 71, Tab B, 4; *75,* Tab L, 1.) The harassment endured by Mrs. McAllister, in this court's opinion, amounted to persecution.

Mrs. McAllister testified that she was frequently stopped and interrogated by the security forces; so frequently that she could not remember, let alone testify, about each incident. She recalled being stopped to and from school for up to thirty minutes at a time. She indicated that stops by the security forces were unpredictable — sometimes occurring daily, sometimes not at all. Although Mrs. McAllister testified that she was never physically harmed during any of these stops, she did indicate that she was verbally insulted, often called a "patty" or "scum." She stated that she was frequently stopped and asked her name, address, and destination, despite the officers knowing full-well who she was and where she lived. Mrs. McAllister testified that these stops, and other actions by the security, forces, led her to distrust and despise the RUC and British army.

The most noteworthy incidents of harassment directed specifically at Mrs. McAllister occurred after her husband was arrested and incarcerated in October of 1976. Mrs. McAllister testified that she was arrested three times within the three month span that her husband was serving his sentence. The first time, Mrs. McAllister was walking her newborn son, Paul, when the same British soldier that had previously beat her husband in the incident leading to his conviction, stopped and interrogated her. He formally placed Mrs. McAllister under arrest, but then released her after Paul's stroller would not fit in his vehicle.

One week later, Mrs. McAllister was home with Paul when a patrol of British soldiers unexpectedly arrived. A female soldier placed Mrs. McAllister under arrest, and transported her and Paul to the Grand Central barracks. Mrs. McAllister testified that she was held and interrogated for four hours, and then driven tick to her house. Three month old Paul remained with her in the Grand Central Barracks throughout her detention.

The third arrest occurred when Mrs. McAllister was walking down the street to meet her friend. The same British soldier that arrested her the first time recognized her and arrested her again. This time he brought her down to the Grand Central barracks. As will be discussed in more detail below, he and other soldiers proceeded to humiliate and degrade her in a bathroom. Afterward, Mrs. McAllister was interrogated and released.

It is apparent that each of these arrests were intended to harass and intimidate Mrs. McAllister. She was never charged with a crime or detained for more than four hours. The British army was not investigating any specific crime and indeed had no cause to interfere with her in any way. From the evidence, this court can detect no legitimate law enforcement purpose for this series of arrests. It was simply a show of force and intimidation meant to harass and annoy Mrs. McAllister. Simply, the arrests were intended to harass and persecute, not prosecute. Matter of RA-, Interim Decision 3403 (BIA 1999).

These specific incidents of targeted arrests, coupled with the hundreds of weekly interrogation stops, are not normal tactics employed by a security force charged with controlling internal violence. Assuming that Mrs. McAllister was only stopped once a week for fifteen years (between the ages of fifteen and thirty), that would amount to seven-hundred and eighty stops. And that is a conservative figure. Mrs. McAllister testified that she was often stopped more than once a week, and sometimes more than once per day, and many times before turning fifteen. That the security forces had a policy of such routine harassment is the only reasonable explanation for these persistent stops. Taken as a whole, these incidents of recurring harassment clearly amount to past persecution. See, 94 F.3d at *1358;* see also Matter of O-Z- & I-Z-, Interim Decision 3346.

Public Humiliation

Mrs. McAllister described two incidents involving the security forces, one more serious than the other, but both equally intended to harass and publicly humiliate her.

This court alluded to the more serious incident above. While Mr. McAllister was serving three months at Long Kesh on assault charges, Mrs. McAllister was arrested three times. The third incident occurred when a British soldier arrested Mrs. McAllister and brought her to the Grand Central barracks. Mrs. McAllister testified that this solider ordered her into the bathroom, the floor of which was covered in stale urine. After other soldiers joined him, the soldier ordered Mrs. McAllister into one of the bathroom stalls and instructed her to strip to her underwear in front of them. Then, without formally arresting or charging her, the soldier released Mrs. McAllister.

The lasting trauma of this incident was apparent in her demeanor on the witness stand. She was visibly moved and testified that she had not previously discussed this incident with anyone except for her husband and her psychiatrist. (Exhibit 88, Tab A.) Having filed no charges against her, it is clear that the soldier, who had fought with Mr. McAllister and attempted to arrest Mrs. McAllister on a prior occasion, had no other purpose than to degrade and humiliate Mrs. McAllister. The fact that this soldier knew that Mr. McAllister was incarcerated only adds to the disturbing nature of his act.

The second incident of public humiliation occurred in October of 1995, when Mr. and Mrs. McAllister were in downtown Belfast shopping with their son. Mrs. McAllister testified that she and her family were walking down the street when an RUC Land Rover drove past them. The Land Rover stopped at the end of the street and the officers said something to the effect of "guess who's out?" — a reference to the fact that Mr. McAllister had just been released from Long Kesh after serving his sentence for his role in the Rose & Crown and QLC incidents. The officers conducted the usual street interrogation and summoned for a female officer to search Mrs. McAllister. The McAllisters waited on the sidewalk in the officers' custody, in full view of the public, for twenty minutes until the female officer arrived. Then, after searching both Mr. and Mrs. McAllister and finding nothing, the officers proceeded to dig through the McAllisters' parcels under the auspices of conducting a search. Mrs. McAllister testified that the officers threw her goods all over the street in full view of the public and simply left them strewn about. The officers did not interrogate or arrest Mrs. McAllister. They did not indicate that she was a suspect in any wrongdoing. They simply harassed and intimidated her because she was a Catholic Nationalist married to an ex-Republican prisoner. In relation to the other described incidents of persecution, these severe and egregious acts highlight the nature of the past persecution suffered by Mrs. McAllister.

The Service, in arguing that Mrs. McAllister has not suffered past persecution, has attempted to characterize this pattern of security force aggression, evident in consistent street interrogations and arrests, as legitimate law enforcement activities. See Service Summation Brief at 3 8-42. Specifically, the Service contends that Mrs. McAllister's three arrests, two of which occurred in the• span of one week, were valid law enforcement investigations. It goes so far as to state that: "The fact, alone, that the female respondent [Mrs. McAllister] was ordered to strip to her underwear and subjected to a search of her person does not seem inconsistent with normal law enforcement activities, since there had been previous bombings of RUC and British Army barracks." Service Summation Brief at 42.

This court does not agree with the Service's conclusion that this was normal law enforcement activity. Mrs. McAllister was first stopped and interrogated on the street. As stated, if there was a valid law enforcement reason to arrest and detain her, the fact that a stroller would not fit into the police vehicle would not matter. Further, there is no stated reason why, one week later, a patrol would return to Mrs. McAllister's home and take her in for further questioning. It must be remembered that Mrs. McAllister was never charged in any of her street stops or arrests.

Finally, the Service's characterization of the incident in the bathroom as "normal law enforcement" is erroneous. See Service Summation Brief at 42. While it alludes to a search, Mrs. McAllister did not testify that the soldiers searched her. From her testimony, which this court finds credible, it appears as though Mrs. McAllister was simply used as a prop to fulfill the curiosities of these soldiers. No legitimate taw enforcement function is served by mal4.idiers corralling a young woman into a urine-soaked bathroom stall and making her strip while they stand by watching. Contrary to the Service's assertion, this is nI consistent with normal law enforcement activities. Matter of R-A-, Interim Decision 3403 (BIA 1999)("police interrogations which are part of a pattern of political suppression give rise to an inference that harm has occurred on account of a protected characteristic, despite the claimed legitimate prosecutorial function of these government agents"); see Matter of S-P 21 I&N Dec. 486, 492-493 (BIA 1996)(severity of abuse and lack of evidence of any legitimate government criminal prosecution is persecution on account of political opinion).

Persecution of family members

Not only was Mrs. McAllister personally persecuted, but she also experienced the persecution of her immediate family, particularly her husband. Both of Mrs. McAllister's Sons testified that they were subject to constant Protestant and government harassment. Each day when she sent her boys off to school, Mrs. McAllister knew that they would have to fight and run to get there safely. She had to live with the knowledge that for her boys, and her other children to come, history would repeat itself, and they would live through the same discrimination, harassment, and persecution that plagued her own life. But as males, she knew they would fare far worse than she ever did, and would likely have experiences more similar to their father's.

Mrs. McAllister repeatedly witnessed the security forces persecuting her husband. In 1975, Mr. McAllister was walking her home when the couple encountered a patrol of British soldiers. Mrs. McAllister testified that she could smell alcohol and suspected that the soldiers had been drinking. Mrs. McAllister watched as the soldiers, without provocation or warning, "beat into [Mr. McAllister] really bad." She testified that she watched as the officers beat her husband to the ground and continued kicking and striking him with their rifles. Mrs. McAllister testified that she stayed with Mr. McAllister and consoled him as he "cried like a baby" after the beating. The soldiers never interrogated or arrested Mr. McAllister.

Incredibly, the Service characterizes this incident as "just drunken army officers harassing an outnumbered youth in front of his girlfriend." Service Summation Brief at 40. This assessment is short-sighted, as it fails to take into account the pattern of harassment perpetuated by the British army and RUG. Drunk or not, Mrs. McAllister watched as the security forces that had discriminated against and harassed her for years, beat her boyfriend to the point of tears. This beating of Mrs. McAllister's loved one right in front of her was not an insignificant incident of harassment as the Service would make it appear, it was far more brutal.

On another occasion, Mrs. McAllister was with her husband and son Paul when a British foot patrol stopped them. The soldiers delivered the standard line of questioning, conducted radio tests, and sent the McAllisters on their way. Fifty yards later, another British patrol, this one traveling by Land Rover, stopped the McAllisters and again initiated the standard interrogation. Mr. McAllister, clearly frustrated, replied that his name was "Mickey Mouse" and refused to be searched. Mrs. McAllister watched as, in response to his uncooperativeness, the soldier struck Mr. McAllister with their rifle butts. They then arrested him in front of his family. Mrs. McAllister testified that she watched as a crowd struggled to free her husband from the soldiers' grasp. The patrol eventually arrested Mr. McAllister, leaving Mrs. McAllister and Paul alone on the street.

In 1985, as will be discussed below, Mrs. McAllister watched as the RUC beat Mr. McAllister when he tried to attend to his injured brother, Joseph. Knowing that her husband had just had a portion of his kidney removed, she watched and screamed as the officers kicked and beat her husband with their rifle butts. Despite her protestations, the officers continued to beat her husband, even after he was subdued in the vehicle. She was powerless to stop them.

In a later incident in 1986, Mrs. McAllister watched as the RUC raided her home and arrested her husband on "investigation of terrorism" charges. She testified that she and her children were awoken and ordered to gather in one room while their house was searched. Finding nothing, the officers arrested Mr. McAllister and dragged him away in front of his wife and young children. In an unrelated incident involving a search years earlier, Mrs. McAllister recalled that security force members with "blackened faces" burst into her parents home and used blinding spotlights to intimidate her family. She recalled that they left as quickly as they came, and did not interrogate, search, or arrest anyone. She stated that this was done to every Catholic home on her street that night.

Physical Abuse

While Mrs. McAllister testified that she was never physically harmed during any of her routine interactions with the security forces, she did testify about one incident in which she was physically assaulted by a patrol of RUC officers.

Mrs. McAllister testified that she followed her husband when they learned that her brother-in- law, Joseph

McAllister, had been allegedly thrown through a plate glass window by the RUC. Mrs. McAllister stated that when she arrived at the house on the next block, her husband was being forcibly dragged from the house. She testified that she yelled and pleaded with the RUC officers to leave Mr. McAllister alone because he had just undergone kidney surgery and was still recovering. Ignoring her pleas, the soldiers loaded Mr. McAllister into their Land Rover and continued to assault him. Mrs. McAllister asked to ride with them to the barracks, and much to her surprise, was permitted to do so, but only for a matter of seconds.

Mrs. McAllister testified that the officers continued to beat Mr. McAllister as the Land Rover pulled away and repeatedly stomped him with their boots and struck him with their rifle butts. In response, she continued to yell and scream for them to stop. She testified that after the Land Rover had traveled only two or three hundred yards, one of the officers said to the other, "get rid of her," and Mrs. McAllister was ejected out the back door of the moving Land Rover, and left in the middle of the street. Mrs. McAllister was pregnant with her only daughter, Nicola, at the time.

Mrs. McAllister's subsequent attempt to obtain the soldiers tames and numbers was thwarted by the desk officer at the Grand Central barracks. Even Mrs. McAllister's lawyer could not get the basic information necessary to file a complaint. For his part, the McAllister's lawyer was forcibly removed from the barracks "like a piece of garbage" by four officers, just for insisting that he be provided the basic information. Although a complaint was eventually filed, it was never acted upon. Indeed, Paul O'Connor and Julia Hall both testified about the inadequacy of the police complaint system. (S Exhibits 71, Tab B, 8; 72, Tab C, 5; 73, Tab G, 3 and 6.)

The Service asserts that this incident is not persecution because the RUC had blocked off the house and Mr. McAllister was therefore legitimately arrested for unlawfully entering the scene. Service Summation Brief at 43. While this may be true, the ensuing beating of Mr. McAllister and the ejecting of Mrs. McAllister from the Land Rover was not legitimate. The Service states that since Mr. McAllister was appropriately arrested, "the female respondent had no right to be inside the police vehicle that was transporting her arrested husband." However, this ignores the evidence. Mrs. McAllister specifically testified that she asked the officers if she could ride with them and they gave her permission. She therefore had a right to be there, and more importantly, had a right not to be ejected out the back of a moving law enforcement vehicle.

Murder Attempt

The most striking and blatant act of persecution, and the one that undoubtedly stands on its own as evidence of past persecution, is the attack on Mrs. McAllister's home on October 2, 1988. Prior to that date, on September 30, 1988, Mr. and Mrs. McAllister decided to take advantage of a last minute opportunity to vacation in Spain. As Mrs. McAllister testified, no one, except their immediate family, knew that they were gone.

On Sunday night, October 2, 1988, at approximately 7:45pm, masked gunmen fired twenty- six shots into the McAllister home. Mrs. McAllister's mother and three children were in the house at the time of the attack. Shots were fired into the first and second floors, indicating that the attackers were not trying to single out Mr. McAllister, but rather, intended to kill the entire family. Mrs. Robinson was taken to the hospital, but everyone was, for the most part, physically unharmed. The psychological trauma, however, is lasting. (Exhibits 56 & 88, Tab A.)

Mrs. McAllister testified that she and her husband did not learn of the attack until they arrived home from their vacation. They returned to see shattered glass in front of their darkened house. Their neighbor, Mickey Fitzpatrick, informed them that their house had been "hit," and that their children were with their grandmother down the street. Mrs. McAllister wept openly when she testified about running to and embracing her children when she saw them at her mother's house. The fear and trauma of knowing that her family was almost killed was evident in her demeanor on the witness stand.

The Service argues that this incident cannot constitute persecution because the identity of the attacker has not been established, and therefore, it is unclear whether the attack was "on account of' a protected ground. See Service Summation Brief at 43. From reviewn6 the evidence in this case, this court finds that there, is strong evidence to believe that Loyalist paramilitaries carried out the attack "on account of' the McAllisters' religion and/or political beliefs.

No other house on the street was attacked that night, and Mr. McAllister's security information was later found in a Loyalist home. (Exhibits *50* and 88, Tab C.) It is clear that the McAllister home was deliberately targeted. The RUC stated that it suspected that a Loyalist paramilitary group called "The Red Hand Commandos" had carried out the attack. (Exhibit 46.) The two individuals ultimately convicted of possessing Mr. McAllister' s security information were also known associates of the Red Hand Commandos. (See Exhibit 88.) In addition, the RUC visited the McAllister home after the attack to warn Mr. McAllister to take heightened security precautions because his security files had been found in the hands of Loyalists, indicating that he could still be in danger.

Moreover, there is some evidence, though primarily inconclusive, that RUC and Loyalist paramilitaries had colluded in the past, and possibly in this attack. (Exhibits 75, Tab N; 74, Tab I.) By their warning, the RUC confirmed that Loyalists had somehow gained access to Mr. McAllister's security files. (Exhibits 50 and 88, Tab C.) Mrs. McAllister also alleges that there was an RUC roadblock in the area that night that the Loyalists would not have been able to pass through undetected unless there was collusion.

With or without government involvement, it is clear that the attack on Mrs. McAllister's home was an act of persecution. If the RUC or British forces were involved, then it is a clear act of government-sanctioned persecution. And even if they were not involved, the Red Hand Commandos and other Loyalist paramilitary groups were violent factions that the Northern Ireland and British governments were unable or unwilling to control. Matter of Kasinga, 21 I&N Dec. at 365; see also Matter of Acosta, 19 I&N Dec. at 222-23. The Service asserts that the RUC and British forces are willing to control the Loyalist paramilitaries. Service Summation Brief at 47. While the Service is correct in its statement that "the evidence indicates that the RUC investigated the offense and have, in fact, made arrests in connection to the offense and investigated any possible threats to the safety of the lead respondent," the evidence is clear that the RUC and British army were unable to control these renegade groups. In the end, the attack was an act of persecution.

Conclusion

Standing on their own, many of the incidents of harm to the McAllister family described above could constitute past persecution. Summing the incidents leads to the inescapable conclusion that Mrs. McAllister was the victim of past persecution on account of her religion, political beliefs, and her relationship as the spouse of a former INLA member. The fact that Mr. McAllister was convicted of crimes and engaged in terrorist activity does not justify the persecution of his wife and minor children. That is indeed the finding of this court.

Country Conditions

The presumption of future persecution based on a showing of past persecution is not absolute. It is a rebuttable presumption that the Service can overcome by showing, by a preponderance of the evidence, that country conditions have changed so much that there is little likelihood of present or future persecution. Matter of S-A-, Interim Decision 3433; see Matter of H-, 21 I&N Dec. at 346; 8 CFR § 208.13(b)(1)(i).

Northern Ireland

It is clear that circumstances in Northern Ireland have changed dramatically since the McAllisters last lived there. On April 10, 1998, the major political groups in Northern Ireland agreed to the "Good Friday Agreement," which sets forth new political and constitutional structures and calls for a cease-fire by paramilitary groups on both sides of the conflict.

Stemming from this agreement are other indicators that peace is being actively sought. The Northern Ireland Human Rights Commission was formed and is currently assisting those who file complaints detailing human rights abuses. (Exhibit 77.) The Patten Commission has studied policing techniques in Northern Ireland and has recommended avenues for improvement. The British government has also undertaken a review of Northern Ireland's criminal justice system. In addition, under the 1998 Northern Ireland (Sentences) Act, political prisoners affiliated with paramilitary groups who have honored the cease-fire have been continually released. Finally, the Fair Employment Act of 1989 and the 1998 Human Rights Act were implemented to correct disparate unemployment rates between Catholics and Protestants, and prohibit religious discrimination respectively.

In addition to the evidence presented at trial, the U.S. Department of State has twice provided letters indicating that, in its view, the respondents can safely return to Northern Ireland. Exhibits 13 and 119.) The first letter (Exhibit 13) is from September of 1997 and does not shed much light on the current conditions in Northern Ireland. The second letter, however, is more recent. Dated September 19, 2000, it states that the Good Friday Agreement and other peace initiatives "make it even less likely than before [in 1997] that the applicant would be persecuted should he return to that country." (Exhibit 119.)

Based on the above evidence and extensive testimony on this issue, this court finds that country conditions have changed to such a degree that there is little likelihood of present or future persecution. See MatterofS-A-, Interim Decision 3433; Matter oH, 21 I&N Dec. at 346; 8 CFR § 208. 13(b)(1)(i). However, this court recognizes that things in Northern Ireland still are not perfect. Even giving the State Department reports their due deference, see Matter of T-M-B-, 21 I&N Dec. 775, 779 (BIA 1997), it is obvious that the peace process in Northern Ireland is not complete. Incidents of violence continue to plague the country and make their way into the headlines. Exhibits 88 and 121.) While great strides at peace have been made, there are still lingering dangers that prevent a finding that all chance of persecution has been effectively eliminated by the Peace Process. However, as stated above, the chances are not such that there is a likelihood of present or future persecution in spite of the recurrence of violence by Loyalist paramilitaries, the fear of

Catholics that this violence could effect their daily lives, and the present makeup of the RUC and its heavily Protestant force.

The United Kingdom

The respondents have indicated that they fear returning to the United Kingdom. In this regard, the evidence was simply insufficient to demonstrate any reasonable fear of danger in Britain, Scotland, or Wales. While Julia Hall testified about suspected links between Northern Ireland paramilitary groups and neo-Nazi organizations, such as "Combat 18," and Paul McAllister testified about conflicts between soccer fans in Scotland, there is simply no evidence from which this court can conclude that the McAllisters would be in any danger in the United Kingdom. According to the State Department, other families from Northern Ireland have successfully relocated within the United Kingdom without incident. (See Exhibit 119.) Any anti-Irish sentiment that may exist in the United Kingdom is not so severe as to constitute a likelihood that persecution would ensue if the McAllisters returned there.

Extent of the Persecution

"The need to demonstrate compelling reasons for being unwilling to return resulting from the severity of the past persecution suffered by the applicant only arises if the presumption of a well- founded fear of future persecution is successfully rebutted." Matter of H-, 21 I&N Dec. at 346. This court must therefore examine whether the past persecution suffered by the respondents was so severe that a showing of future persecution is unnecessary. .Matter of Chen, 20 I&N Dec. at 19 (based on severity of past persecution, asylum may be granted where there is little threat of future persecution); 8 CFR § 208.13(b)(1)(ii); Desirv. llchert, 840 F.2d 723, 729 (9thCir.

1988) ("past persecution, without more, satisfies the requirements of the asylum statute], even independent of establishing a well-founded fear of future persecution").

The Board recognizes that, despite a change in country conditions, an alien may be granted asylum solely on the basis of the severity of the past persecution. Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997)(Chinese sterilization); Matter of H-, 21 I&N Dec. at 337 (Somalia); Matter of , 21 I&N Dec. 66 (BIA 1995)(Afghanistan). In severe cases, persecuted aliens seeking asylum in this country should not be expected to repatriate. Matter of Chen, 20 I&N Dec. at 19. Such a determination is discretionary. Matter of N-M-A-, Interim Decision 3368 (BIA 1998).

The seminal case, Matter of Chen, involved a man from China, who suffered persecution intermittently from 1966-197 5 during the so-called Cultural Revolution. Matter of Chen, 20 I&N Dec. at 19. In addition to his father being severely persecuted, Chen, suffered many incidents of persecution over a number of years. In 1966, at the age of eight, he was locked in a room with his grandmother for six months and endured continuous interrogation and deprivation of food. at 20. Throughout the early seventies, Chen was beaten on several occasions and exiled to rural villages for "reeducation." See id. On more than one occasion he was denied medical attention — medical attention that was necessary because of the abusive treatment he was receiving. See id.

The Board found that, since the time of his persecution, conditions in China had changed significantly. See id. However, the Board held that Chen and his family were "severely persecuted," and therefore granted asylum as a matter of discretion despite the changed country conditions. The Board concluded:

> While conditions in China have changed since the time the respondent was persecuted, the basic form of government there has not changed, human rights are still sometimes abused, and there is little religious freedom. The respondent is closely identified with a religious family. While he may not have a "well-founded fear" of persecution in China, we do not think that all chance of persecution on account of his religion has been eliminated by the change in regime since the Cultural Revolution. Moreover, it is evident that the respondent genuinely fears returning to China.

See id.

Finally, the Board noted that cases concerning the severity of past persecution should be analyzed on a case-by-case basis. j.4 at 22. In addition, the Board made clear that the circumstances in Matter of Chen form neither the floor nor ceiling for facts which may constitute past persecution severe enough to warrant a grant of asylum despite changed country conditions. ("We shall not attempt to delineate the circumstances under which past persecution may or may not be the basis for the successful asylum claim.").

While keeping the case-by-case distinction in mind, the similarity between the circumstances in Matter of Chen, and the circumstances of the present case are striking. Both Chen and Mrs. McAllister endured having close family members persecuted, and then both were themselves• persecuted over a period of time. Chen, endured the trauma of having his father, a Christian minister, persecuted. Chen's father's home was ransacked and his personal possessions were confiscated. See id at 19. He was imprisoned and repeatedly dragged through the streets in a humiliating manner. On one occasion he was badly injured after being pushed into a bonfire at 19-20. As detailed above, Mrs. McAllister and her children endured the persecution of Mr. McAllister. The McAllister home was searched and both Mr. and Mrs. McAllister were arrested repeatedly without being charged. In addition, the RUC and British army humiliated Mr. and Mrs. McAllister on numerous occasions. On several occasions, Mr. McAllister was badly injured after interactions with the security forces.

Not only was Chen's father persecuted, but Chen himself suffered. At only eight years old, he was locked in a room with his grandmother and routinely deprived of food. Later, over the course of almost ten years, he was subjected to "reeducation" exiles, during which, he was often abused and denied medical attention. While Mrs. McAllister was not locked in a room for six months, she was, like Chen, persecuted over the course of many years. She was repeatedly harassed on the streets and arrested without cause. She was thrown from the back of a moving Land Rover, while pregnant, and was forced to strip in front of soldiers in a bathroom stall. Finally, her home was attacked in an attempt to murder her entire family. She was targeted for persecution because of her political opinion, religion, and status as the wife of an ex-Republican prisoner.

The analysis employed by the Board in Matter of Chen is equally applicable here. This court finds that the severity of the past persecution in the present case warrants a grant of asylum, despite the significantly changed country conditions in Northern Ireland. See at 21. Like the Board found in Matter of Chen, the changed country conditions here do not override the severity of the past persecution. This court finds that while conditions in Northern Ireland have changed significantly since Mrs. McAllister and her children were persecuted, and there is little likelihood of future persecution, there is still recurring violence, and the RUC is still a Protestant police force. In addition, as his family, the respondents are closely identified with Mr. McAllister, an ex-Republican prisoner and Nationalist paramilitary member, who seems to have achieved a great deal of media attention. While this court does not believe that Mrs. McAllister and her children have a "wellfounded fear" of persecution in Northern Ireland, it does not think that fl chance of persecution has been effectively eliminated by the Peace Process. j In addition, this court finds that the severity of the past persecution to the McAllisters warrants a grant of asylum despite the fact that they could safely relocate in the United Kingdom. In other words, relocation to Northern Ireland, the United Kingdom, and even the Republic of Ireland is no longer an issue based on this court's finding regarding the severity of the past persecution. See id.

This court does not subscribe to the Service's view that Mrs. McAllister's past persecution was caused by Mr. McAllister's "hack of finding trouble." Service Summation Brief at *54.* Nor does it agree that the incidents of past persecution are "at worst, inconvenience coupled with lawful arrest and interrogation." This court finds even less convincing the Service's contention that Mrs. McAllister and her family are unwilling to return to Northern Ireland or the United Kingdom because they are "comfortable" here in the United States. See id at *54-55.* Such characterizations unduly minimize what this court finds to be severe incidents of past persecution.

The lasting effect of the McAllisters' experiences in Northern Ireland are clear. Each member of the family's trauma manifests in different ways. Mr. McAllister testified that be suffered bouts of depression and alcohol abuse. Both he and Mrs. McAllister have been treated by psychiatrists. (Exhibit 88, Tab A.) Paul has also been treated by a psychiatrist and testified that he cannot speak of his experiences in Northern Ireland without crying. (Exhibit *56.)* Mr. and Mrs. McAllister and Paul have each been diagnosed with post-traumatic stress disorder. (Exhibits 88, Tab A and *56.)* Even Mark's struggles with alcohol abuse, which he testified to, may arguably be attributable to his experiences in Northern Ireland as a youth.

This court is cognizant of the fact that the Canadian Immigration Court denied Mrs. McAllister's asylum claim based on the fact that, in its view, she could safely relocate to the United Kingdom. (Exhibit 107.) The Canadian decision in *Mrs.* McAllister's case was not presented as evidence in these proceedings. From Mrs. McAllister's testimony, it seems as though her claim was summarily denied without further analysis. In any event, this court is not bound by the actions of the Canadian Immigration Court, and it is unclear whether Canadian immigration law has a comparable standard to Matter of Chen, providing asylum based solely on the extreme nature of the past persecution.

In conclusion, this court finds that the past persecution suffered by Mrs. McAllister and her family, in light of the Matter of Chen standard, is so severe as to warrant a grant of asylum. As stated, Matter of Chen sets the method of analysis for cases of this type, but each case must be viewed on an individual basis. Here, this court is convinced that Mrs. McAllister and her children suffered severe past persecution, and repatriating them would violate the general humanitarian principles this county's asylum laws were designed to protect. Matter of Chen, 21 I&N Dec. at 19.

Discretion

Finally, a grant of asylum pursuant to INA § 208 is discretionary. INS v. Stevic, 467 U.S. at 423 n.18; see Matter of Acosta, 19 I&N Dec. at 218. Therefore, in addition to establishing statutory eligibility, the alien also has the burden of establishing that the favorable exercise of discretion is warranted. Matter of Shirdel, 19 I&N Dec. at 38. When adjudicating an alien's application for asylum, the Immigration Judge must be mindful of "the fundamental humanitarian concerns of asylum law." Matter of S-P-, 21 I&N Dec. at 492; see Matter of S-A-, Interim Decision 3433. In fact, the Board has instructed that: "[central to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past." Matter of H-, 21 1&N Dec. at 347. Absent any adverse factors, asylum should be granted in the exercise of discretion if the alien is otherwise eligible. Matter of Pula, 19 I&N Dec. at 474.

For all of the reasons indicated in the preceding sections, this court finds that the demonstrated severity of the past persecution mandates a grant of asylum in this case. As set forth above, there are, without a doubt, compelling humanitarian reasons consistent with this country's asylum laws for granting Mrs. McAllister and her children asylum. Detecting no material adverse factors, this court finds that the favorable exercise of its discretion is warranted. Matter of Pula, 19 I&N Dec. at 474.

2. Withholding of Removal and Torture Convention Relief

Because this court has granted Sarah, Nicola, and Sean asylum under INA § 208, it need not address their applications for withholding of removal under INA § 241 (b)(3), withholding and deferral of removal pursuant to the Torture Convention, or voluntary departure under INA § 240(B).

C. Paul McAllister

1. Testimony

Paul McAllister was born in Belfast, Northern Ireland, on July 5, 1976. (Sc Exhibit *57.)* Like his parents, he is a Catholic Nationalist who believes in a united Ireland free from British rule. He was twelve years old when his family left Northern Ireland for Canada on December *15,* 198. He testified that he has vivid memories of his daily trips to school through Protestant neighborhoods and the fights that ensued between the Catholic and Protestant youths. He also stated that as a result of numerous interrogation stops and the experiences of his father, he feared the security forces and considered them "the enemy."

He testified that he remembers the incident on February 2, 1982, when his father was arrested in their home. He stated that the RUC broke down their front door and pushed into their living room. He remembers the officers searching the house and then taking his father **to** jail. He testified that he also remembers the night of October 2, 1988, when his house was attacked.

Paul testified that he was in the house on 15 Farnham Street with his grandmother, brother Sean, and sister Nicola. He recalled that it was approximately 7:30pm because he was waiting in the living room for a television program to begin at 8:00pm. Consistent with the account given by his grandmother, Anne Robinson, Paul described going upstairs with Nicola to check on Sean, who was hissing in his crib. He stated that he, Nicola, and Sean were playing on the bed when he heard a "bang," looked out the second floor window, and saw a masked gunman standing at their gate approximately fifteen feet below. He recalled the gunman saw him peering out the window, and in response, raised his weapon and shot up at him and into the second floor bedroom. He testified that he ran from the window to the bed, pulled the covers over himself and his siblings, and remained there until someone came up after the attack. He remembers his grandmother being taken to the hospital by ambulance, and having to live with a friend until his parents returned from Spain. He also recalled his family's separation, what he termed as "living on the run," in the weeks following the attack.

Paul testified that he began having nightmares not long after the attack, consisting mostly of men in masks pointing guns at him. Later in 1997, after his family came to the United States, he saw a psychiatrist to help him cope with his nightmares. (Exhibit *56.)* Paul stated that despite the counseling, he has difficulty containing his emotions and still cries whenever he discusses his experiences in Northern Ireland.

Paul stated that since leaving Northern Ireland he has kept abreast of developments there through newspapers, television news, and the Internet. He testified that he does not think there will be peace in Northern Ireland and could not "handle it mentally" if he were forced to return. He stated that he fears being targeted by the same group that attacked his family's home and may be a victim of guilt by association at the hands of the RUC based on his father's status as a former Republican prisoner. He also stated that he equally fears returning to England, Scotland, or Wales because he considers it "the same place as Northern Ireland]" and is aware of anti-Irish sentiments throughout the United Kingdom.

Paul concluded his testimony by stating that he currently works in New York City as a construction laborer with J.T. Meghan. He stated that he has filed annual income tax returns and has never been arrested in Northern Ireland, Canada, or the United States.

2. Asylum

The asylum analysis conducted in his mother's case is equally applicable to Paul. He was in Northern Ireland until he was twelve years old and experienced many of the same things as did his mother, albeit on a much smaller scale. However, given his tender age at the time, that scale probably did not seem so small to him. He did, in fact, suffer long-term trauma that he continues to deal with today. He testified that he is in a psychiatrist's care and cannot speak of his experiences in Northern Ireland without suffering an emotional breakdown. (Exhibit 56.)

Paul's testimony was consistent with that of his parents and brother, and detailed the reasons he fears returning to Northern Ireland and the United Kingdom. He was in the house the night it was attacked and looked the gunman straight in the eye. At his young age, he had a gun pointed directly at him from approximately fifteen feet away, and experienced the immediate fear that the ensuing shots intended to take his life would find their mark. Such an event, experienced by a twelve year old, is undoubtedly past persecution. For the reasons stated in this court's analysis of the severity of his mother's past persecution, this court finds that the severity of Paul's past persecution warrants a statutory and discretionary grant of asylum. Matter of Chen, 20 I&N Dec. at 19.

3. Withholding of Removal and Torture Convention Relief

Because this court has granted Paul asylum under NA § 208, it need not address his applications for withholding of removal under NA § 241(b)(3), withholding and deferral of removal pursuant to the Torture Convention, or voluntary departure under NA § 240(B).

D. Mark McAllister

1. Testimony

Mark McAllister was born in Belfast, Northern Ireland, on March 10,1979. (Exhibit 59.) He lived on the Lower Ormeau Road until his family fled to Canada on December 15, 1988. While Mark was only nine years old when he left, he did recall memories of his life in Northern Ireland. He testified that he fought with Protestant youths on a daily basis to and from school. He also got into scraps with the RUC, often throwing bottles and stones at the officers.

He testified that he remembers the morning of February 2, 1982, when the RUC came to his house to arrest his father. He recalled the entire family being awakened and corralled into a single room while officers searched the house. He also remembers the officers taking his father away. Likewise, he remembers the night of October 2, 1988, when Loyalists attacked his house.

Mark testified that he was playing soccer at the time of the attack, but remembers returning to his house after the shooting to find his grandmother and siblings outside. When they told him that their house was attacked, he recalled thinking: "Why us? What did we do?" He remembers that the house was cordoned off and he went to live with his grandmother for the remainder of the week.' He stated that he lived in constant fear that "people would come in at night." Soon after the attack, Mark and his family moved to Canada.

Mark stated that he lived in Canada until he was sixteen years old. In that time, he had various brushes with the law and arrests for juvenile offenses, including stealing soda from a garage, underage drinking, and shoplifting. He testified that he started drinking in Canada when he was approximately fifteen or sixteen years old.

In the United States, Mark graduated from Wallington High School in New Jersey and thereafter began working in the construction field with his father as a laborer. His struggles with the law, however, continued. He testified that since coming to the United States he has experimented with alcohol, marijuana, and ecstasy. On April 6, 1998, Mark pleaded guilty to possessing and consuming an alcoholic beverage as a minor in violation of N.J.S.A. *2C:33-15a.* (Exhibit 98.) He also testified that he was arrested and convicted of driving while intoxicated in May of 1998 in Hackensack, New Jersey, and was sentenced to a fine and participation in an alcohol treatment program. His most serious charges, however, are still pending.

In May of 2000, Mark was arrested for distribution of a controlled dangerous substance (ecstasy). (Exhibit 97.) On July 18, 2000, Mark was indicted by a New Jersey grand jury empaneled in Bergen County for performing an act of sexual penetration with a minor in violation of N.J.S.A. 2C: 14-2c(4). (Exhibit 96.) Both cases are currently pending before the New Jersey Superior Court. On the advice of his lawyers, Mark exercised his privilege against self-incrimination under the Fifth Amendment in response to the Service's questions regarding the pending charges against him.

2. Analysis

On March 10, 2000, Mark McAllister turned twenty-one years old and "aged-off" of his mother's application for asylum. INA § 101(b)(l) (defining "child" as an unmarried person under twenty-one years of age). Consequently, on August 16, 2000, he submitted his own separate and independent application for asylum and withholding of removal. (Exhibit *95.)* Upon reviewing his application at that time, this court discovered (and as indicated above it later surfaced in his testimony) that Mark faces pending criminal charges in New Jersey for separate incidents allegedly involving sexual assault and distribution of a controlled dangerous substance. (S Exhibits 95, 96 and 97.)

Mark testified that he has pleaded not guilty to both the assault and distribution charges. Given the serious nature of these offences, a conviction for either or both could render Mark ineligible for asylum and withholding of removal. But at this stage, these charges are merely allegations. Since asylum is a discretionary form of relief, it would be fundamentally unfair to adjudicate Mark's application amidst the taint of these looming criminal charges. The bedrock of our American system of criminal justice is the presumption of innocence afforded each and every criminal suspect. See. Coffin v. United States, *156* U.S. 432, 453 (1895) ("[Presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); see also In Re Winship, 397 U.S. 358, 363 (1970). While the immigration laws and regulations may permit it, in this court's opinion, it would be unjust to proceed with a decision in Mark's case without first letting the criminal justice system take its course. Accordingly, this court will continue Mark's proceedings pending the disposition of his criminal charges and will set down his case for February 27, 2001, at 8:30am.

VI. Conclusion

This court finds that Malachy McAllister is removable from the United States pursuant to INA § § 237(a)(l)(B), 237(a)(1)(A)!2 12(a)(2)(A)(i)(I), 237(a)(1)(A)/2 12(a)(2)(B), and 237(a)(4)(B). In addition, it finds that he is statutorily ineligible for asylum, withholding of removal, withholding of removal pursuant to the Torture

Convention, and voluntary departure. Further, it finds that he has not met his burden of proof on his application for deferral of removal pursuant to the Torture Convention, and will therefore deny his application for relief. Finally, this court finds that Malachy McAllister should be removed from the United States to the United Kingdom on the charges contained in the Notice to Appear.

This court also finds that Sarah B. McAllister, Nicola McAllister, and Sean R. McAllister are removable from the United States pursuant to NA § 237(a)(1)(B). However, this court also finds that they are refugees who have suffered severe past persecution, and will therefore grant their application for asylum, negating the need to reach their alternate applications for relief.

This court further finds that Paul McAllister is removable from the United States pursuant to NA § 237(a)(l)(B). However, this court also finds that he is a refugee who has suffered severe past persecution, and will therefore grant his application for asylum, negating the need to address his alternative applications for relief.

Finally, this court finds that Mark McAllister is removable from the United States pursuant to NA § 237(a)(l)(B). It further finds that due to pending criminal charges against him, his case will be continued until February 27, 2001 at 8:30am, to allow time for the criminal justice system to complete its work.

VII. Orders

A. Malachy McAllister

IT IS ORDERED that Malachy McAllister's application for asylum pursuant to INA § 208 be DENIED.

IT IS FURTHER ORDERED that Malachy McAllister's application for withholding of removal pursuant to INA § 241(b)(3) be DENIED.

IT IS FURTHER ORDERED that Malachy McAllister's application for withholding of removal pursuant to the Torture Convention be DENIED.

IT IS FURTHER ORDERED that Malachy McAllister's application for deferral of removal pursuant to the Torture Convention be DENIED.

IT IS FURTHER ORDERED that Malachy McAllister's application for voluntary departure pursuant to INA § 240B be DENIED.

IT IS FURTHER ORDERED that Malachy McAllister be removed from the United States to the United Kingdom on the charges contained in the Notice To Appear.

B. Sarah B. McAllister

IT IS ORDERED that Sarah B. McAllister's application for asylum pursuant to 1NA § 208 be GRANTED.

C. Paul McAllister

IT IS ORDERED that Paul McAllister's application for asylum pursuant to INA § 208 be GRANTED.

D. Mark J. McAllister

IT IS ORDERED that proceedings related to Mark McAllister's applications for relief from removal be continued and scheduled for a Master Calendar hearing at 8:30am on February 27, 2001.

E. Nicola McAllister

IT IS ORDERED that Nicola McAllister, as a dependent of Sarah B. McAllister, be GRANTED asylum pursuant to INA § 208.

F. Sean R. McAllister

IT IS ORDERED that Sean R. McAllister, as a dependent of Sarah B. McAllister, be GRANTED asylum pursuant to INA § 208.

October 11, 2000

/s/HENRY S. DOGIN
U.S. Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4513/04-3695

MALACHY MCALLISTER; *MARK J. MCALLISTER; SARAH B. MCALLISTER; PAUL GARY MCALLISTER; NICOLA MCALLISTER; SEAN R. MCALLISTER,

Petitioners,

v.

ALBERTO GONZALES*
Attorney General of the United States
Respondent..

Before: RENDELL, BARRY and ROTH*, Circuit Judges

ORDER

The petition for panel rehearing filed by the Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is **denied**.

By the Court /s/ Jane R. Roth

Circuit Judge

Dated: June 16, 2006

CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE III. JUDICIAL POWER

USCS Const. Art. III, § 2, Cl 1

Sec. 2, Cl 1. Subjects of jurisdiction.

?The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS

8 U.S.C. §1182(a)(3)(B)(iii)(V)(b)

(iii)--Terrorist Activity Defined

As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I)--

The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II)--

The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III)--

A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV)--

An assassination.

(V)--

The use of any--(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.